TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 66

THE STATE OF WASHINGTON ON THE RELATION OF STIMSON TIMBER COMPANY, PLAINTIFF IN ERROR,

vs.

E. V. KUYKENDALL (JOHN C. DENNEY, SUBSTITUTED), AS DIRECTOR OF PUBLIC WORKS OF THE STATE OF WASHINGTON, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED MAY 17, 1928

(31,939)

(31,939)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 378

THE STATE OF WASHINGTON ON THE RELATION OF STIMSON TIMBER COMPANY, PLAINTIFF IN ERROR,

vs.

E. V. KUYKENDALL (JOHN C. DENNEY, SUBSTITUTED), AS DIRECTOR OF PUBLIC WORKS OF THE STATE OF WASHINGTON, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

INDEX

	Original	Print
Record from superior court of Thurston County	1	1
Petition for writ of review	1	1
Exhibit A—Letter from Reynolds, Ballinger & Hutson to department of public works	8	7
Order for writ of review	9	8
Writ of review	10	8
Proceedings before department of public works of Washington	12	9
Findings of fact	12	10
Opinion	19	17
Order fixing rates	24	21
Statement of evidence	25	21
Testimony of Otis L. Shively	25	21
W. T. Isted	34	29
C. W. Stimson	39	33

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 2, 1926

	Original	Print
Testimony of W. T. Isted (recalled)	46	38
Otis L. Shively (recalled)	51	42
T. H. Jennings	51	43
H. O. Berger	61	51
Lindley Davis	69	57
A. L. McNealy	70	58
Harry Ramwell	76	62
Charles C. Croft	78	64
Martin Hefner	80	66
G. S. Atwood	82	68
Judgment	85	70
Notice of appeal	86	71
Bond on appeal (omitted in printing)	87	
Proceedings in supreme court of Washington	88	72
Opinion, Askren, J	88	72
Separate opinion, Bridges, J	100	83
Petition for rehearing (omitted in printing)	104	
Order denying petition for rehearing	112	86
Judgment	113	86
Petition for writ of error	114	87
Assignments of error	117	89
Order allowing writ of error	125	96
Bond on writ of error (omitted in printing)	126	
Writ of error	129	97
Citation and service (omitted in printing)	132	
Stipulation re transcript of record	135	98
Order substituting parties respondent	141	104
Proof of service of writ of error papers (omitted in printing)	143	
Clerk's certificate (omitted in printing)	144	
Statement of points to be relied upon and designation to print the entire record	145	105

[fol. 1] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

No. 9826

STATE OF WASHINGTON on the Relation of STIMSON TIMBER COMPANY, a Corporation, Relator, Plaintiff,

vs.

E. V. KUYKENDALL, as Director of Public Works of the State of Washington; Walter B. Whitcomb, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, and Together Constituting the Department of Public Works of Said State, Respondents.

PETITION FOR WRIT OF REVIEW—Filed November 18, 1924

Comes now Stimson Timber Company, a corporation, and by this its Petition shows the Court as follows:

I

The Relator is and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and it has paid to the State of Washington its license fee last due; and at all times herein mentioned E. V. Kuykendall was and still is Director of the Department of Public Works of the State of Washington, Walter B. Whitcomb was and still is Supervisor of Public Utilities of said Department, and Frank R. Spinning was and still is Supervisor of Transportation of said Department.

II

That at all times herein mentioned your petitioner was and still is the owner of certain timber lands situate near the Town of Clifton on Hood Canal in the County of Mason and State of Washington, and also of a sawmill situate on

Lake Union in the City of Seattle, in King County, State of Washington, and was and is engaged in logging its said timber lands and transporting said logs to its said mill and [fol. 2] there manufacturing said logs into lumber which thereafter it sold, and sells, upon the open market; that it is not engaged in the manufacture, or the manufacture and sale, of fir logs, nor in the transporting thereof otherwise than is hereinabove set forth.

III

That heretofore and prior to the 10th day of March, 1924, Relator entered into a contract with Shively Tow Boat Company, which was then the owner of a certain tow boat, for the towing of its said logs from its said logging camp near Clifton to its mill at Lake Union. That said logs are not scaled but were put up in sections and in tree length logs, well and properly secured in said sections; and because of the manner in which the said logs are made up into sections and the ease and security with which they could be towed, and because it was agreed between the parties to said contract that said logs might be towed by said Shively Tow Boat Company, and they were towed by it, at its convenience, it was agreed that the towage rates upon said logs from said logging camp to said mill should be Sixteen and One-half ($16.50) Dollars per section, and that said rate was and is a fair and reasonable rate.

IV

That on to-wit said March 10, 1924, Relator, being informed that some other or different rate for the towing of logs between said points per section had been filed with the Department of Public Works of the State of Washington, made inquiry concerning the same and on March 11th, 1924, was advised by letter from said Department, by Sam L. Crawford, its Secretary, that there was then no schedule on file or offered for filing naming rates for towing logs by the section. That afterwards on the 29th day of April, 1924, the Schedule of Rates for Towing Logs on Puget Sound, No. 5544, was amended or supplemented by the filing of a rate on logs towed from said Clifton in Mason

[fol. 3] County to Lake Union in King County so as to fix the rate of towage per section on such logs at Twenty-five ($25.00) Dollars.

V

That afterwards on June 6th, 1924, Stimson Timber Company, this Relator, complained to said Department of Public Works of the State of Washington of said rate and requested a hearing thereon. A copy of said complaint is hereto attached, marked Exhibit A, and is hereby referred to and made a part hereof. That said complaint was filed and instituted in Thurston County, State of Washington, in the office of said Department of Public Works. That thereafter said complaint was set down for hearing and was heard on the 22nd day of July, 1924, pursuant to notice duly given, before said E. V. Kuykendall, Director, and Frank R. Spinning, Supervisor of Transportation. That afterwards the Findings of Fact, the Opinion and Order of said Department were made on the 17th day of October, 1924, at Olympia, Washington and notice thereof to this Relator was mailed from Olympia, Washington, on October 23, 1924, and was received by this Relator on October 24, 1924; That said Findings, Opinion and Order were based upon evidence taken at said hearing; That said proceedings, findings, opinion and order were made in a proceeding entitled in said Department: Stimson Timber Company, Complainant, vs. Northwestern Tow Boat Owners Association and Shively Tow Boat Company, Respondents, No. 5713.

VI

That in said Findings of Fact said Department of Public Works held in substance and effect that said Shively Tow Boat Company is a public service company subject to the jurisdiction of the Department of Public Works and that the service so rendered by said Shively Tow Boat Company to this Relator was and is affected with a public interest, and was and is a contract of public service and of common carriage; and said Department likewise held that [fol. 4] a rate of Twenty-five ($25.00) Dollars per section for towing said fir logs from Clifton in Mason County to

Lake Union in King County (being from Zone 53 to Zone 107) is a just, fair and reasonable rate and nor more than sufficient, and that a rate of Sixteen and One-half ($16.50) Dollars per section for said towage was and is an inadequate rate; and Relator further states that in Finding X of said Findings, said Department found that since March 1, 1924, said Shively Two Boat Company has been towing logs for your Relator at the rate of $16.50 per section and that the lawful rate of said tow boat company for the movement in question was 94¢ per M. up to and including April 30, 1924, and since May 1, 1924, the lawful rate of said tow boat company has been $25.00 per section; and by said order the complaint of this Relator was dismissed; said rate of $25.00 per section for the towing of fir logs from Zone 53 to Zone 107 (in which the movement of Relators logs from said Clifton to said Lake Union Mill would be included) is found just, fair and no more than sufficient; and that said Shively Tow Boat Company should at once collect from your Relator the difference between the charges assessed and what in said tenth finding said Department of Public Works found to be the lawful and legal rate for said movement.

VII

That said Findings, Opinion and order of said Department of Public Works were and are in excess of the jurisdiction of said Department, and are illegal, erroneous and void and not in the course of common law; and that said Order of said Department is contrary to law, and that the same is unreasonable for the following reasons, to-wit:

a. That the said Department of Public Works had and has no jurisdiction to fix rates for the towing of logs in the waters of Puget Sound and its tributaries.

b. That said service so performed by said Shively Two [fol. 5] Boat Company for this Relator was not and is not affected with the public interest, and was not and is not an act of common carriage, but is an act of private carriage subject to private contract in which the public is not concerned.

c. That your Relator was and is the only person having logs to be towed from the vicinity of Clifton in Mason County, Washington, to Lake Union in King County, Washington; and said rate, if it were applicable to said towage, was made without the application or consent and against the will of the only persons interested therein, namely this Relator and said Shively Tow Boat Company.

d. That the conditions under which said logs are and were towed, to-wit that said timber was cut into tree length logs which were secured into sections in an unusual manner different from and more secure than that in which logs customarily are rafted, whereby the towing of said timber is made unusually easy and safe, made said rate of 94¢ per M, said to be in force prior to May 1, 1924, and said rate of $25.00 per section, said to be in force after May 1, 1924, inapplicable, unreasonable and excessive; and it appearing that said logs have not been and are not scaled, there is no manner by which the said rate of 94¢ per M can be applied to any such movement.

e. That said Findings of Fact are not supported by the testimony but are contrary thereto in this; that in fixing said rate by said Findings, Opinion and Order, said Department of Public Works took into consideration many factors not proper to be considered in fixing said rate and other elements of which there was no sufficient evidence, and made said rate without any sufficient or adequate valuation of the property engaged in said service; and in fixing said rate considered not only the necessity of a vessel to perform said service but also of some other vessel to be used as a standby and not to be at the same time engaged in said service and fixed said rate in part by speculation [fol. 6] and conjecture upon material points upon which there was no evidence; and that said Department unlawfully intervened in the transaction between Relator and said Shively Tow Boat Company in which no other person, firm or corporation was interested, and which was satisfactory to both parties thereto, to set aside and annul a contract which when made was and still is a lawful contract.

f. That said Order requiring said Shively Tow Boat Company to collect from your Relator the difference between the rate of $16.50 per section paid by it and said rate of $25.00 per section, is further unreasonable, unfair and illegal for the reason that prior to May 1, 1924, Relator's logs were not scaled, and there was no way by which a rate based upon the number of feet in each tow could be estimated.

g. That it appears by the evidence that the conditions attending the towing of logs on the waters of Puget Sound are not and can not be standardized and that no fair and adequate rates can be fixed therefor, and that to fix such rates in the alternative upon the basis of a given rate for towing scaled logs and another given rate for the towing by the section of unscaled logs will result in inequality and in oppression either to the tow boat company or to the owner of the tow.

h. That a rate for towage based upon a scale of the logs towed or upon a price per section of logs towed, without taking into consideration the number of sections or the number of feet of logs towed, is unreasonable and unlawful and must result in inequality of rates for given services.

VII

That Relator has no plain, speedy or adequate remedy in the ordinary course of law, nor otherwise than by proceeding for the review of said order.

[fol. 7] Wherefore Relator prays that a Writ of Review be issued herein to Respondents commanding them to certify fully to this Court at a time and place to be specified therein a transcript of all the records and proceedings of respondents in said proceeding that the same may be reviewed by this Court, and that upon the hearing this Court set aside said Order of respondents, and that the Court make such other and further order in the premises as may be just and right.

Reynolds, Ballinger & Hutson, Attorneys for Relator.

Duly sworn to by C. W. Stimson. Jurat omitted in printing.

[fol. 8] "EXHIBIT A" TO PETITION

(Seattle, Washington,) June 6th, 1924.

Department of Public Works of Washington, Olympia, Washington.

Attention O. O. Caldhead, Traffic Expert

GENTLEMEN: The undersigned, representing Stimson Timber Company, respectfully protest the filing of the rate on logs towed from Clifton in Manson County to Union Bay in King County as the same appears in the rates scheduled in cause No. 5544, filed in the office of the Department of Public Works of Washington on the 29th day of April, 1924, for the following reasons, to-wit:

1. That said Schedule and rate were established without jurisdiction on the part of said Department, said Stimson Timber Company not having received notice of the hearing held for the purpose of establishing said rate after said Stimson Timber Company had, through its attorneys, notified said Department of its desire to be present at the time of the fixing of said rate and of its interest in said rate, and of the fact that it was the only company having interest in said rate.

2. That said rate is unreasonable and exorbitant for the service rendered in the towing of said logs, the rate heretofore in force having been agreed upon between the only parties interested in said towing.

3. That said transportation of said logs by towing the same from Clifton to Union Bay is not "affected with a public interest" and it is not such business as comes within the jurisdiction of said Department.

Wherefore the undersigned, attorneys for Stimson Timber Company, respectfully request a hearing upon said rate at a time and place convenient to said Department of Public Works.

Respectfully submitted.

Reynolds, Ballinger & Hutson, Attorneys for Stimson Timber Company.

CAR:O.

[fol. 9] In Superior Court of Thurston County

[Title omitted]

Order for Writ of Review—Filed November 18, 1924

Be it remembered this matter came duly on for hearing this 18th day of November, 1924, on the Petition of the above named Relator for a Writ of Review directed to the above named Respondents. The Court having considered the matter and being duly advised in the premises;

It is hereby ordered by the Court that a Writ of Review issue out of this Court in this cause directed to the above named Respondents commanding them that they do, on to-wit the 10th day of December, 1924, make return to said Writ and certify their record in this case to this Court that the same may be reviewed by this Court, and in the meantime to desist from further proceeding in the matter.

It is hereby ordered that a copy of said Petition be served with said Writ.

Done in open court the day and year first above written.

John M. Wilson, Judge.

[File endorsement omitted.]

[fol. 10] [File endorsement omitted]

In Superior Court of Thurston County

[Title omitted]

Writ of Review—Filed November 18, 1924

The State of Washington to E. V. Kuykendall, as Director of Public Works of the State of Washington; Walter B. Whitcomb, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, and together constituting the Department of Public Works of said State, the above-named respondents:

Whereas an application by way of Petition has been made in this Court by the above named Relator, a copy whereof

is herewith served upon you, wherefrom it manifestly appears that you, in the exercise of your judicial functions, have exceeded your jurisdiction and have acted illegally in that certain matter lately pending before you and numbered in your records #5713, entitled: Stimson Timber Company, Complainant, vs. Northwestern Towboat Owners Association and Shively Tow Boat Company, Respondents, and particularly in the Order made by you in said proceedings, in which said application the above named Relator asks a Review of your said action for the purpose of having its reasonableness and lawfulness inquired into and determined;

[fol. 11] Now, therefore, you are hereby directed to certify your record in said cause and proceeding to this Court on the 10th day of December, 1924, in order that the same may be reviewed, including the evidence and exhibits introduced before you, and to appear in this Court on the return day aforesaid, then and there to receive what the Court shall order in the premises.

Witness the Honorable John M. Wilson, one of the Judges of the above named Court, and the Seal thereof, this 18th day of November, 1924.

Paul Paulk, Deputy Clerk of said Superior Court.
(Seal.)

[fol. 12] Before the Department of Public Works of Washington, Division of Transportation

No. 5713

Stimson Timber Company, Complainant,

vs.

Northwestern Towboat Owners Association and Shively Towboat Company, Respondents

Findings of Fact, Opinion, and Order

This matter came on regularly for hearing at Seattle, Washington, on the twenty-second day of July, 1924, pursuant to notice duly given, before E. V. Kuykendall, Di-

rector, and Frank R. Spinning, Supervisor of Transportation.

The complainant was represented by Charles A. Reynolds, attorney at law, of Seattle; the Northwest Towboat Owners Association by Hance H. Cleland, attorney at law, of Olympia; and the Shively Towboat Company by Otis L. Shively, its manager.

Witnesses were sworn and examined, documentary evidence was introduced and the Department, being fully advised in the premises, makes and enters the following findings of fact, opinion and order:

Findings of Fact

I

The complainant, Stimson Timber Company, is engaged in the manufacture of lumber at Seattle, Washington. Its mill is located on Lake Union. It owns and operates a logging camp on Hoods Canal some six miles below Clifton, distant about one hundred miles by water from Seattle. It employs various towing companies to tow its logs to Seattle. Since the first of March of this year, this work has been done by the Shively Towboat Company. Prior thereto and since 1920, C. C. Croft, Martin Heffner, C. S. Atwood and perhaps others have been so engaged.

II

The Shively Towboat Company operates tugs, towboats, barges and lighters for the public use in the conveyance of [fol. 13] property for hire over and upon the waters within the state of Washington; and is a public service company, subject to the jurisdiction of the Department of Public Works.

Respondent, Shively Towboat Company, has filed with this Department concurrence in the tariffs of the Northwestern Towboat Owners Association, whereby it made the Northwestern Towboat Owners Association its agent for the compilation, filing and publication of tariffs and adopted as its own tariffs filed by the Northwestern Towboat Owners Association.

Tariff Number Four, Washington Department of Public Works Number Four, of the Northwestern Towboat Owners Association, effective September thirtieth, 1923, names a rate of ninety-four cents per one thousand feet for towing fir logs between Zone Fifty-three and Zone One Hundred and Seven.

Supplement Number Two to said Tariff Number Four, effective May first, 1924, names an additional rate of twenty-five dollars per section for towing fir logs from Zone Fifty-three to Zone One Hundred and Seven. This section rate is the only section rate in the tariffs of Puget Sound towboat operators. It was put in to accommodate complainant and to relieve complainant of the necessity of scaling its own logs. The evidence indicates that it is actually the same or slightly less than the rate of ninety-four cents per thousand feet.

III

Complainant contends that the rate of twenty-five dollars per section is unreasonable and that the reasonable rate is sixteen and one-half dollars per section.

IV

Since March first, 1924, the Shively Towboat Company has operated in this service a boat named the "Katherine M." The "Katherine M" is a three hundred horse power tug, valued at fifteen thousand dollars. The evidence indicates that the work requires a boat about equal in power to the "Katherine M." It also tends to show that the value [fol. 14] placed on the "Katherine M." is rather low for a boat of her power.

Witness Shively testified that, during the four months period beginning March first, 1924, the "Katherine M." had made fourteen trips from Clifton to Lake Union, towing sixteen sections each trip. At the twenty-five dollar rate, this would produce a gross revenue of five thousand, six hundred dollars, or one thousand, four hundred dollars per month. Witness Shively further testified that the "Katherine M." earned three thousand, eight hundred dollars, or an average of nine hundred and fifty dollars per month, in outside work during the same period.

V

The monthly expenses of the "Katherine M." were given by Witness Shively as follows:

Office	$461.25
Wages of Crew	580.00
Fuel and Oil	449.70
Deck Stores, Lines, et cetera	200.00
Taxes	15.00
Insurance	35.00
Board and Bedding of Crew	151.50
Depreciation on Engine and Boat	62.50
Repairs to Engine and Boat	90.00
Total Monthly Expenses	$2,044.95

The expense figures above listed were in the main verified by the testimony of Witnesses Davis and McNealy.

We think the item for insurance is entirely too low. This item of thirty-five dollars includes full marine insurance for five thousand dollars, costing twenty-five dollars a month, and five thousand dollars additional fire insurance, costing ten dollars per month. The towboat business is beset with hazards. Boats are frequently lost through perils of the sea. From newspaper accounts, we are informed that the "Katherine M." sank in the Pacific Ocean since the date of the hearing. We think the towboat owner is entitled to include the cost of full marine insurance in the rate base. Fifteen thousand dollars full marine insurance, at six per cent, would amount to seventy-five dollars. This sum should be substituted for thirty-five dollars, set out for insurance in the above tabulation.

[fol. 15] The record is very incomplete as to repairs, maintenance and depreciation. The item of sixty-two and one half dollars for depreciation on the engine and boat given by Witness Shively was reached by allowing twenty years as the life of the engine and boat. The record indicates that the witness has had little experience with Deisel or semi-Deisel engines. He owned one other such engine, which lasted some three or four months. The record does not show how long he has had the present engine. Other

witnesses, with much greater experience with these types of engines than Shively, placed the life of such engines at six or seven years.

The record in this case is too incomplete to enable us to compute the depreciation for the engine and boat. No evidence was introduced tending to show how much of the fifteen thousand dollar valuation is represented by the engine and machinery and how much by the hull. Witness Shively apparently did not think depreciation should be allowed on the hull. It was apparently his opinion that the hull would last forever if repairs were kept up. His view is incorrect in principle and impracticable for valuation purposes.

The item for repairs is the average of the repairs for four months. It does not include anything for dry docking and painting the hull and it includes nothing to cover such contingencies as recalking, repairing damage caused by rocks or other dangers to which a towboat is exposed. The evidence indicates that repair bills for Deisel or semi-Deisel engines vary greatly from month to month. During one month, the entire repairs may consist in minor adjustments. The next month the engine may require a new crankshaft or a reboring of the cylinders. We think that the bills for a four month period cover much too short a time to be taken as an average.

As bearing upon this question of expenses, we note that Witness Davis testified that it cost him one hundred and ninety-three dollars per month during the year for repairs to the machinery for a boat similar to the "Katherine M." [fol. 16] The evidence indicates that the Federal Government allows a flat depreciation of fifteen per cent. This figure is probably about correct, if no allowance is made for maintenance and repairs in addition. However, this Department does not care to put itself on record as allowing such depreciation. We will instead, for the purposes of this case, take the figures as given by Shively, with the exception of insurance, and consider them as the monthly expense of the towboat.

VI

According to Witness Shively, the average gross earning per month of the "Katherine M." for the four months were two thousand, three hundred and fifty dollars, exceed-

ing the monthly expense by $265.05 and yielding a yearly return of twenty-one and two-tenths per cent on the investment in that vessel alone, without regard to any vessel or equipment for standby service. This figure of two thousand, three hundred and fifty dollars includes nine hundred and fifty dollars as the average monthly sum received for outside work.

We do not think the earnings of the "Katherine M." can be taken as indicating the probable average monthly earnings for a full year. The "Katherine M." operated during a period of the year when storms are rarely encountered. She averaged three and one half trips per month. The camp was apparently in full operation and offered the "Katherine M." a full tow each trip. The mill was apparently working full time and able to receive all logs brought in.

The testimony of Heffner and Croft describes another condition. They testifed that they had averaged only three trips per month, that they were often forced to take less than a full tow to keep the mill running and that their boats were required to be on the job all the time and had no opportunity to do outside work.

In fixing a rate, earnings over a considerable period of time should be taken. Operations must go on in foul as well as in fair weather, in slack times as well as good times. [fol. 17] If we consider the testimony of Croft and Heffner as indicating the monthly earnings during foul weather and slack times, the rate of return will be considerably reduced. If the amount of outside work drops from nine hundred and fifty dollars to seven hundred and fifty dollars per month, the return on the investment drops to five and two tenths per cent per year.

VII

Witness Shively and other witnesses at the hearing testified that the return of fifteen per cent is fair and reasonable. We are of the opinion that an actual return of fifteen per cent above all proper deductions for expenses, computed on a proper rate base, is too high, even in the hazardous business of towing in the waters of Puget Sound. It is true that the operations of towboats are beset by hazards

not met by other public service companies and against which no insurance can be taken. Tows are frequently lost through foul weather and encounters with other vessels. It sometimes costs two or three thousand dollars to gather the logs together again. A few such adventures would place the operations of practically any Puget Sound towing company in the red. Towing is, to a considerable degree, dependent upon the condition of the wind and tides. A towboat will often be held for a period of several days waiting favorable wind and tide. Statistics covering several years' operation would show that these contingencies affected revenues in a definite amount, which could be represented by a mathematical factor. In the absence of such statistics, we are not in a position to say whether or not an apparent profit of a certain per cent is excessive.

VIII

A consideration of the facts of this case fully demonstrates the impossibility, at this time at least, of fixing the towing rate for a particular movement by considering the revenues and expenses of that movement only. The rate for the log movement here considered is merely one of many similar rates on the Sound.

[fol. 18] No tow boat operates exclusively on one movement. Its revenues are the result of all its operations and are not separable into various movements. The whole rate structure of the Sound must be considered as a unit. The general level of the rates has not been challenged and must be taken as reasonable. If a particular rate is challenged, the Department should consider not only the reasonableness of the rate in itself as applied to the particular movement but as compared with rates for other similar movements and as a part of the general rate structure.

No towing fleet can long maintain efficient service without one or more boats in reserve for standby service. Boats must occasionally be taken out of service for repairs and a rate base should properly include one or more suitable boats for standby service. This principle is recognized in all forms of transportation; and, in view of this fact, the consideration of a single boat in a single movement does

not furnish a sufficient basis alone for the determination of a towing rate.

Lindley Davis, A. L. McNealy, Harry Ramwell, C. C. Croft, Martin Heffner and G. S. Atwood all testified that the rate of twenty-five dollars for the movement in question was just and reasonable, and that a lower rate would be insufficient to yield an adequate return. These witnesses compared the movement in question to the tow from Clifton to Everett. This latter tow is about the same or slightly less in distance than the movement from Clifton to Seattle. The Everett movement, under the rate per one thousand feet, yields about four hundred and sixty dollars for a sixteen section tow. The movement in question will yield, under the section rate, four hundred dollars for a sixteen section tow. The rate per thousand feet from Tacoma to Seattle is fifty cents and the distance about thirty miles. The testimony conclusively shows that the twenty-five dollar rate here considered is about ninety-four cents per thousand and the distance about one hundred miles. All the witnesses except Shively considered the rate in question one of the lowest rates on the Sound. They are men of long [fol. 19] experience in the steamboat business, whose opinions are entitled to considerable respect.

IX

We find that the rate of twenty-five dollars per section for towing fir logs from Zone Fifty-three to Zone One Hundred and Seven is just, fair, reasonable and no more than sufficient.

X

Since March first, 1924, the respondent, Shively Towboat Company, has been towing logs for the Stimson Timber Company at the rate of sixteen and one-half dollars. As shown by Finding Number Two herein, the lawful rate of the Shively Towboat Company for the movement in question was ninety-four cents per one thousand up to and including April thirtieth, 1924. Since May first, 1924, the lawful rate of the Shively Towboat Company has been twenty-five dollars per section.

The order herein will therefore require the Shively Towboat Company to assess and recover by legal action, if necessary, from the Stimson Timber Company, the difference between the charges assessed and the tariff charges.

OPINION

The Stimson Timber Company, in its complaint and at the hearing, contended that the rate for towing logs from Clifton to Lake Union, established by Order Number 5544, is invalid for the reason that the Stimson Timber Company did not receive notice of the hearing after its attorneys had notified the Department of its desire to be present.

We regard this contention as moot. Complainant had in the present hearing a full opportunity to present evidence to show the reasonable rate for the movement in question. Moreover, the record does not bear out complainant's contention. The hearing, upon which Order Number 5544 was based, was held May thirty-first, 1923. Order Number 5544 was entered September eighteenth, 1923. The hearing for [fol. 20] the supplemental order was held February twenty-seventh, 1924, and the supplemental order entered March twenty-fourth, 1924. The letter of Mr. Reynolds to the Department is dated March tenth, 1924, subsequent to the hearings. The reply of the Secretary fully informed him of the status of the tariffs at that date.

The Department followed its customary procedure in these hearings. It notified all towboat owners, the various Chambers of Commerce in the large cities, the West Coast Lumbermen's Association and the Loggers Information Bureau. These latter bodies include most of the lumbermen, loggers and mill men of the district. It did not notify every person who might employ a towboat. Such a course would manifestly be impossible.

Complainant further contends that the movement in question is not "affected with a public interest," and is not within the jurisdiction of the Department. This objection must be overruled. The Stimson Timber Company is in no position to object to the jurisdiction of the Department. In the first place, it has appealed to the Department

to exercise its jurisdiction to fix a reasonable rate for the movement. It is elementary that a party can not deny the jurisdiction of a tribunal and at the same time ask it to take action in his behalf. Secondly, the Department has not attempted to exercise jurisdiction over the Stimson Timber Company. It has not ordered the Stimson Timber Company to do or to refrain from doing anything. The Stimson Timber Company is not a public service company.

If the movement is not "affected with a public interest," the Shively Towboat Company is the proper party to object to the jurisdiction. It is the company upon whom the regulation falls. The towboat company has not made objection to the jurisdiction of the Department over the movement in question. Moreover, it would seem that the towboat company is not now in a position to urge such an objection. It has filed concurrences in the tariffs naming rates for this movement. This action would prevent the [fol. 21] Shively Towboat Company from now contending that the Department has no jurisdiction over the rates named in the tariff or that the business done thereunder was not public. Van Hoosear versus Commission; 184 California 553, Public Utilities Reports 1921-C 447.

Moreover, we are of the opinion that this movement is affected with a public interest. The record amply shows that the Shively Towboat Company comes within the statutory definition of a "public service company." It holds itself out as ready to serve the public. The service rendered to the Stimson Timber Company is not unusual or distinctive. Other companies have logs in the vicinity of Clifton, which are towed to various points on the Sound.

The Stimson Timber Company has not now and never did have a special contract for the towing of its logs. Other towboat operators have done the work. All charged the same price, to-wit, sixteen and one half dollars per section. This was evidently the tariff rate which they then charged for the tow.

We are of the opinion that a special contract, if one existed, would result in a preference in favor of the Stimson Timber Company and a discrimination against other companies having logs in the vicinity of Clifton. The Stimson Timber Company contends that the manner in which they arrange their tows distinguishes the work and justifies a

lower rate. We think the opinion of the Supreme Court in Public Service Commission versus State ex rel. Great Northern 118 Washington 629 (Wallace Falls case), rebuts this contention. If the rate for this particular movement can be the subject of a special contract, all other towboat operations can be, with equal reason. Such a holding would destroy regulation and nullify Chapter One Hundred and Sixteen, Laws of 1923.

The Stimson Timber Company assailed the validity of Tariff Number Four of the Northwestern Towboat Company for the reason that the rates named therein were not [fol. 22] based upon any valuation of the property used. From a consideration of the findings of fact and order in Cause Number 5544 and the testimony in this case, it would appear that the towboat rates on Puget Sound were historical rates fixed by competition. These rates were first named many years before the Department of Public Works or its predecessors came into existence. They appear to have arisen from the necessities of the occasion. The various towboat men would meet and come to an agreement as to the rate between certain points. As the Puget Sound district became more developed, these rates gradually became more intricate. When the predecessors of the Department of Public Works were created, rates formerly observed were carried in the tariffs filed. Tariff Number Three of the Northwestern Towboat Owners' Association was issued on May seventeenth, 1924. Tariff Number Three named rates which had developed through a course of years. In addition, it provided rates for intermediate points. The rates for intermediate points were provided by establishing zones, all points within one zone taking the same rate. Tariff Number Three was suspended and cancelled by the Department for the reason that the rates named therein were not the actual charges assessed but were subject to percentage increases and decreases. The order of the Department also required the Northwestern Towboat Owners' Association to issue its Tariff Number Four, identical with Number Three except that its rates named the actual charges which were assessed.

No formal valuation of the towboats and equipment operating on the Puget Sound has been made by the Department. The evidence indicates that some considera-

tion has been given to value in the formulation of the present tariff, however, and no evidence has been adduced to indicate that the tariff challenged permits an unreasonable return on the value of the property devoted to this service. [fol. 23] Towing rates on Puget Sound have long been a source of annoyance to shippers and operators alike. The rates now in effect are the result of some years of experience and study, both on the part of the towboat operators and the traffic division of this Department.

Formerly each operator sought to name rates for his particular movements without regard to general conditions, with the result that rates were in a chaotic condition, there being, in many instances, higher rates for short than for long hauls, with some movements providing excessive earnings and others compelling operations at a loss, and resulting in discrimination.

The tariff now in effect represents a good faith effort to establish fair, reasonable and uniform towing rates on Puget Sound.

If individual operators, parties to the tariff, are permitted to dicker with individual shippers, making special rates for specific movements under the guise of special contracts, the whole rate structure will soon be undermined and the former chaotic conditions brought back.

The general rate level has not been challenged. We do not deny the right of any shipper or operator to challenge any specific rate; but, before the rate for a particular movement will be overthrown, it must be shown not only that it is unreasonable in itself but also that it is unreasonable in its relation with other rates in the tariff for similar movements. Of course, if an attack were made on the general rate level of the tariff and, as a result, it should be determined that such general level is either too high or too low, such determination might automatically lower or raise the specific rate complained of.

[fol. 24] In this case, no general attack on the rate structure is made; nor has it been shown that the rate complained of is unreasonable in itself or by comparison with rates named in the tariff for other similar movements.

ORDER FIXING RATES

From the foregoing findings of fact, the Department concludes and it is hereby ordered:

I

That the rate of twenty-five dollars per section for the towing of fire logs from Zone Fifty-three to Zone One Hundred and Seven is just, fair and no more than sufficient; and that the complaint herein should be and the same is hereby dismissed.

II

That the Shively Towboat Company at once collect from the Stimson Timber Company the difference between the charges assessed and the lawful and legal rate provided in its tariff in accordance with Finding Number Ten herein.

Witness the Department of Public Works of Washington this seventeenth day of October, 1924, at Olympia, Washington.

Department of Public Works of Washington, by E. V. Kuykendall, Director. Walter B. Whitcomb, Supervisor of Public Utilities. Frank R. Spinning, Supervisor of Transportation.

Attest: Sam L. Crawford, Secretary.

EVK:REO:HOB:SAD.

[fol. 25] BEFORE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON

Statement of Evidence

OTIS L. SHIVELY, after being first duly sworn, testified as follows:

Direct examination.

Mr. Reynolds:

Q. What is your business?
A. The tow boat business.

Q. Where are you operating?

A. Well, out of Ballard.

Q. You have a contract with the Stimson Timber Company for the towing of logs by sections, between Clifton and here, particulary on Lake Union?

A. Not a contract.

Q. You are operating?

A. Yes. We have an agreement.

Q. What is the basis of that agreement,—just state what that agreement is.

A. Merely that we will tow logs from their camp on Hoods Canal to their mill on Lake Union, for $16.50 per section.

Q. And you have been operating for how long?

A. For five months.

Q. I will ask you whether or not there is any other company operating between those two points.

A. Not in this same service.

Q. And you are the only person towing?

A. So far as I know, yes.

Q. And the Stimson Timber Company is the only manufacturer shipping or towing logs from this point?

A. As far as I know, it is.

Q. Now, I will ask you to state how many boats you have in the service.

A. I have one boat in that service.

[fol. 26] Q. How many scows?

A. Not any, in that service.

Q. I will ask you to state what is, if you know, approximately the earnings of that service; just state whether or not it is remunerative.

A. I believe it is.

Q. I will ask you to state whether or not, in determining that question, you took into consideration the depreciation of your boat, and the overhead expenses?

A. We did.

Q. And all of the different items?

A. Yes, sir.

Q. And I would ask if you have figured that out to your satisfaction?

A. Not in that particular work; I have not gone into the detail of it, but I do know that it pays.

Q. How do you know that it pays?

A. From the difference between our earnings and our expenses.

Q. You are satisfied with the operation at that price, are you?

A. Yes, sir.

Q. And Mr. Stimson is satisfied?

A. I believe he is.

Q. Is there any other person or persons interested, as far as you know?

A. None so far as I know.

Q. Approximately, could you state what are your earnings on your investment in this service?

A. I would say it was—it would run about fifteen per cent.

Q. It would run about fifteen per cent on the investment?

A. Yes, sir.

[fol. 27] Cross-examination.

Mr. Cleland:

Q. How long have you been towing the Stimson logs?

A. Since the first of March.

Q. 1924?

A. Yes, sir.

Q. How many tows have you made?

A. Well, I cannot say offhand, but about four 16-section tows per month, with the exception of the last month of June—I think we got through about the 15th of this month.

Q. That would be about $400 a tow?

A. No, sir.

Q. How much would it be?

A. We tow them in 32-section lots.

Q. You made, then, four 32-section tows?

A. No, four 16-section or two 32-section tows per month, is about the way it runs.

Q. Well, that would be about the same, then, as four 16-section tows—that is $400.00 for a 16-section tow?

A. No, it figured something like $518.00 for a 32-section tow.

Q. What is your investment in the boat?

A. In that boat? About $15,000.

Q. What is the name of it?

A. The Catherine M.

Q. And those have all bee- hauled at the $16.50 rate?

A. Not since the first of June; there has been no settlement since this rate has been put into effect.

Q. How many did you haul during the month of March?

A. Well, I cannot tell from this exactly. I believe there were either three or four sixteen-section tows.

[fol. 28] Q. In the month of March?

A. Yes.

Q. How many in April?

A. About three 16-section tows.

Q. How many in May?

A. About four, or two 32's.

Q. And in June?

A. About an equal amount.

Q. And in July?

A. I haven't the figures for July.

Q. I understand that you collected at the $16.50 rate for all except the month of June?

A. Up until the time this rate was put into effect; that was the first of June—it may have been the first of May; I don't know.

Q. Don't you know? What do your records show on your collections?

A. Why, I have not any records that show that, here. All I have here is the operation; it doesn't show the collections.

Q. You say that is the only boat you have in towing operations?

A. No, sir.

Q. How many boats have you?

A. Three at the present time.

Q. Towing logs?

A. No, sir.

Q. Have you any other boats in the operation of towing logs, other than the Catherine M.?

A. No, sir, other than for short tows along Lake Washington, but not a real towing boat.

* * * * * * *

[fol. 29] Q. How much have you invested in other boats, which are operated out of your Bolcom Canal Company's office?

A. I have just taken over five scows and one boat, but they have not come into operation at this time.

Q. What have you had in operation during the period you have been hauling the Stimson Lumber Company's logs—how many boats What is their value?

A. The Interlaaken, valued at about $3,500.00, and one scow valued at $2,000.00.

* * * * * * *

Q. How many trips, how many tows, and how much other work has the Catherine M. done for others than the Stimson Timber Company during the time you have been hauling the Stimson Timber Company's logs? How many trips has she made for anybody else?

A. She has made perhaps two trips for the Bolcom Lumber Company.

Q. That is a separate and distinct company from the Stimson Timber Company?

A. Yes.

Q. About how many trips has she made?

A. I could better answer that in dollars, if you would like.

Q. All right, answer.

A. I can't tell by this exactly, (referring to paper held in his hand) what she did for the Bolcom Lumber Company; I could give you the totals.

Q. That is for the territory in which you have been hauling the Stimson Timber Company's logs?

A. Yes.

[fol. 30] Q. Do I understand that your operations have been limited; that is, that you started in with hauling the Stimson Timber Company's logs—that those were the first operations you had.

A. We were operating a tow boat before that time. I have been at this same location for seven years.

Q. Give the amounts, then, during the time that you have been hauling the Stimson Timber Company's logs, and the time when the Catherine M. has been hauling the Bol-

com Lumber Company's logs; and when the Catherine M. has also hauled for the Bolcom Canal Lumber Company—

A. The Catherine M. hauled for something like $500.00—well, wait a minute. I wasn't going to give you the Bolcom Lumber Company's. Well, she did apparently about five hundred dollars' worth gross, in addition to the Stimson Timber Company's business, in the month of March, which was the first month during which we hauled for the Stimson Timber Company. In April, she did about $300. worth, and in May about $1,000. worth; in June, about $2,000.00 worth.

* * * * * * *

The Director: I would like to ask Mr. Shively one or two questions.

Q. You say, in towing these logs, you tow by sections, instead of by the thousand; that is, you charge by sections?

A. Yes, sir.

Q. What is a section? It is a new business to me.

A. A section is the amount of logs you can surround by four long-boom-sticks.

Q. Well, about how many thousand feet ordinarily would a section embrace?

A. Well, anywhere from fifty to seventy thousand feet.

[fol. 31] Q. Fifty thousand to seventy thousand?

A. Yes. It is depending upon the size of the logs and the way they are stowed, of course.

Q. Are you a member of the Northwestern Tow Boat Owners Association?

A. No, sir.

Q. Do you tow for anybody else at this rate?

A. No, sir.

Q. Is that the cheapest rate you have?

A. No, sir. I cannot say it is the cheapest rate we have; I don't know.

Supervisor Spinning: Were you ever a member of the Northwestern Tow Boat Owners' Association?

A. I never have been, no, sir.

Q. You have been towing how long?

A. The Shively Tow Boat Company was organized in 1918. I have been towing for fifteen years, personally.

Mr. Cleland:

Q. How far is Clifton from Lake Union?

A. Between 90 and 100 miles.

* * * * * * *

Mr. Cleland:

Q. Have you made any allowance or provision for lost tows, or anything of that kind?

A. No, sir.

Q. And you estimate that there is no possibility of any number of logs, or a log, ever getting out of the tows?

A. I believe they are towed at the owner's risk.

Q. What do you mean, towed at the owner's risk?

A. The man who owns the logs takes the risk, and insures them.

[fol. 32] Q. Why do you believe that?

A. It is on the tariff, also—at the owner's risk.

Q. Where is that tariff found? Is there such a provision in it?

A. There used to be; I think it is in there now.

Mr. Cleland:

Q. Well, while that is carried in the tariff, "towed at the owner's risk," it means towed with diligence and care, doesn't it?

A. Yes.

Q. And is there ever a possibility that the tow boat owner might be charged with negligence, and put to the expense of either recovering those logs or paying for them?

A. I don't know of any such case.

Q. You don't have any idea that anything of that kind would happen?

A. Yes, we have had many spills——

Q. What did you do?

A. Picked them up.

Q. What did it cost you to pick them up?

A. I believe our worst spill cost us around eight hundred dollars—seven or eight hundred dollars.

Q. Was that for the Stimson Timber Company?

A. No, sir.

* * * * * * *

Q. What is the nature of the other operations which you perform with the Catherine M.?

A. We tow logs around.

Q. Where do you tow them from?

A. Tacoma, Priest Point, Everett, Utsaladdy, Chinook Bay and other places.

[fol. 33] Q. How many tows have you made from Everett, or from Priest Point, or Tacoma, during the last five months?

A. We have made quite a number, from Tacoma; several.

Q. With the Catherine M.?

A. Yes, sir.

Q. You also handled a number of tows, or a large number of logs, around the harbors and bay?

A. Yes.

Q. That is the principal use to which you put your boat when she is not in the use of the Stimson Timber Company?

A. Oh, no; there—she is not a harbor boat. We don't do much shifting with her, if that is what you mean.

Q. That is what I mean. Have you hauled any logs for any one else by the section?

A. No, sir.

* * * * * * *

Q. Have you a copy of your agreement with the Stimson Timber Company?

A. It is nothing but verbal.

Q. It was a verbal understanding?

A. Yes.

Q. And that is to the effect that you would charge the $16.50 which was charged by one of your predecessors in this operation?

A. We have just continued, that is all. The understanding was that at first I would take them and see how we came out.

Q. You just kept on towing at $16.50?

A. Yes, sir.

Q. You didn't figure on how you were coming out?

[fol. 34] A. No.

Q. In other words, they just wanted you to come in and do the towing when the other man quit, and you told them you would try it out, at $16.50?

A. I understood that they were doing it at that time, and I went up and went after the job. They didn't come to me.

Q. And you got it?

A. I did.

Q. You were not familiar with the fact that several other people went after the same job at the same rate, and quit and went broke?

A. I heard some noise to that effect.

Q. You have not started making any noise yourself yet?

A. No, not I.

* * * * * * *

Q. Have you hauled any logs from Potlach?

A. Yes, sir.

Q. Those logs are cut into sawlog lengths?

A. I believe so.

Q. How near is Potlatch to Clifton?

A. I believe about twelve miles.

Q. In other words, the hauling is the same?

A. Practically.

* * * * * * *

W. T. Isted, after being first duly sworn, testified as follows:

Direct examination.

Mr. Reynolds:

Q. You are the secretary of the Northwestern Tow Boat Owners' Association?

A. I am.

[fol. 35] Q. How long have you held that position?

A. Well, I guess about five years; ever since it was organized.

Q. How many members are there of that association?

A. Fourteen.

Q. What are the qualifications for membership?

A. Any one is eligible for membership in the Association, who operates a tow boat.

Q. Who is in the tow boat business?

A. Yes.

Q. How many companies are there operating on Puget Sound altogether?

A. I don't know how many companies; if you ask me how many boats, I can give it to you.

Q. How many boats?

A. I imagine there are about 125 vessels.

Q. 125 tow boats?

A. I think that is about the number; that is, that includes gasoline and steamboats.

Q. But there are only 14 companies that operate more than one boat?

A. I don't think there are 14 companies, altogether.

Q. That operate more than one boat?

A. I can tell you in just a minute. There would be about 20 companies that operate more than one boat.

Q. Now, your Association filed this rate with the Department, did it not?

A. Yes.

Q. And you agreed among yourselves as to what the rates were to be, before you filed that? That is, the members [fol. 36] of your Association agreed upon that first, and then they were filed?

A. Tha rates go back a good many years before the Association was organized. There was a previous association, consisting of the gas boat operators, and the steamboat operators, and I think the majority of them, and they had filed their tariff. And when the Northwestern Tow Boat Owners' Association was organized, it took that tariff as a basis upon which rates were made. Then complaints came in, and were referred to the Public Service Commission, and the rates were amended as complaints came in. Later on, we asked for a reduction in rates, when business was poor, and then the war came on, and we asked for an increase in rates to meet conditions, and after the war was over we asked for a reduction of ten per cent in the rates.

Q. You are speaking now of the Association, when you say that?

A. Yes, sir, of the Association. There were not a great many operators or members of our Association that I don't think were financially in a position to pay the dues.

Q. What are the dues?

A. Twenty dollars per month.

Q. And which of those fourteen companies pay the twenty dollars per month? And who are thereby permitted to participate in those rates?

A. Oh, everybody participates in those rates.

Q. Do you hold meetings to determine what those rates should be?

A. No. If a question comes up, we have a monthly meeting, and those rates are discussed.

Q. And you determine what they shall be?

A. We talk them over; we don't determine that; we talk [fol. 37] them over and see if that is a fair rate. One man might say, "I am doing this for so much," and another one for so much, and so on.

Q. I want to ask you this: if you knew that the Stimson Timber Company were operating from Clifton, at the time you fixed this particular rate?

A. Yes.

Q. Now, I want to ask you if you notified or called upon Mr. Stimson, or consulted with him in writing as to what that rate should be?

A. We never confer with the people we are working for.

Q. You don't consult with them at all?

A. No, sir; not the Association.

Q. You take this up regardless of their interests in the matter?

A. No; we confer with the Department, and whenever we want to make a change in the tariff, we figure it up with the Department, and then they have a hearing, and they advertise it in the papers, etc., and the hearings are held, and we have to appear and show why.

Q. Now, did you know at the time you fixed this rate who was operating for the Stimson Timber Company?

A. No, sir.

Cross-examination.

Mr. Cleland:

Q. How many of the 125 tow boats that operate on Puget Sound are owned by the fourteen members of the Association?

A. Roughly speaking, I should say about fifty per cent.

Q. The making of rates made by your Association are the same as rates are made or proposed by any other Association or public carrier company, that is, the officers deter- [fol. 38] mine upon the filing of a particular rate, and it is filed in the regular manner with the Department of Public Works at Olympia, and takes the same course as any other rate?

A. Absolutely.

Mr. Cleland: That is all.

Mr. Reynolds: That is all.

The Director: Just a moment. Is it a fact that practically all of the tow boat operators are parties to this tariff of the Northwestern Tow Boat Owners' Association?

A. I think it is, Senator; yes.

Q. Well, the Association may have been instrumental in promulgating the tariff and having the hearings called, and the rate ultimately determined, yet the tariff is used by practically all the operators engaged in towing boats; isn't that a fact?

A. Yes, sir.

The Director: That is my understanding of it.

Mr. Cleland: In other words, they file a concurrence with the Department, in whatever tariffs the Association files?

A. Our traiff shows right on the face of it just who concur in our rates.

Mr. Reynolds: As I understand it, a few of you get together and you determine what the rates should be, without consulting the consumer, the person who has to pay the rate?

A. That is the idea, the same as a man selling lumber.

Q. And then you take it to the Department and ask them to file it?

A. We ask for an amendment to our tariff.

[fol. 39] Q. There is no such thing as competition between the tow boat operators in the state?

A. We are the same as the railroads; we are under their jurisdiction. It is not a question of choice; that is, it is a

matter of law. There are a lot of things they force us to do that we wish they didn't.

* * * * * * *

C. W. STIMSON, being first duly sworn, testified as follows:

Direct examination.

Mr. Reynolds:

Q. What is your name?
A. C. W. Stimson.
Q. And what is your business?
A. I am in the lumber business.
Q. You are connected with the Stimson Timber Company, the complainant in this matter?
A. Yes.
Q. I will ask you to state what price you have been paying, prior to this hearing, for the towing of logs per section, from Clifton to Union Bay, your mill.
A. We never towed any logs from Clifton to our mill.
Q. I mean, what have you been paying?
A. We have been paying $16.50, and our camp is below Clifton about six or seven miles; and I would not say right now, but the rates from Clifton and from our camp are two totally different things. Clifton is in the side flats, and the boats cannot get in there, and you can get out of our boom at any stage of the water.
[fol. 40] Q. Can they get out at Clifton at any stage of water?
A. They can not.
Q. I will ask you if your booms are arranged in a manner to make them easier to tow?
A. Yes.
Q. Just explain that to the Department.
A. Well, all of our booms are open fore and aft; there are no cross-logs in them at all; no cross-swifters. The swifter-sticks are the poles that hold the logs together. Those are on top, similar to what they are in B. C.
Q. I will ask you to state whether or not any of the members of the Northwestern Tow Boat Owners' Association

offered to do this work for you at the same price you are paying?

A. I couldn't answer that, because I don't know who are the members of the Association.

Q. I will ask you if any one else offered to do this for the same price.

A. Yes, quite a number of them; Mr. McNealy, and Mr. Haffner, and Mr. Anderson.

Q. All of them offered to do it at the same price?

A. Some did and some didn't. Mr. McNealy wanted twenty dollars, although the last time he talked with me—Mr. Croft did it for fifteen at one time; and when the price of lumber went up, I voluntarily offered to raise his price ten per cent, to $16.50. Mr. Haffner, of the Bremerton Tow Boat Company, I think it was, did our work for $16.50, and somebody by the name of Wagner did it for $16.50, and solicited the business then; but they wanted more than we ever paid——

Q. I will ask you if for doing this work, you had to go out and solicit somebody to do it, for you, or whether they came to you unsolicited.

[fol. 41] A. I think in every single instance, except in the case of somebody by the name of Wagner,—I never talked with him,—I think he is the only one we ever called up and asked to do the business; but my impression is that he solicited the business prior to that time, but I would not make that as a positive statement.

Q. Now, is there any one else besides yourself, who is interested in this at all?

A. No, sir.

Q. Nobody else hauling from that point?

A. No, sir, nobody else that I know of, towing logs rafted in the same way ours are. This rate that is filed, in other words, is absolutely aimed at our company, and nobody else; it is a rate filed against us absolutely, because nobody else is interested in it, and nobody else puts up the logs like we do, *and nobody else puts up the logs like we do*, and nobody else, particularly from near Clifton, tows all their logs to Lake Union.

Q. And you are satisfied with the rate that you are paying for the work, and the man that is receiving the pay is satisfied?

A. Yes; and if he doesn't want to keep on, I can find others who will do it at that price, if the law will permit me to do so.

Mr. Reynolds: That is all.

Cross-examination.

Mr. Cleland:

Q. Is there any movement of logs from Clifton?

A. Yes, there are some truck loggers.

Q. I mean towing logs, towing operations, of your logs from Clifton.

[fol. 42] A. Not ours; ours are all put in at our own boom, which is below Clifton about six and a half or seven miles. There are logs being put in at Clifton by some smaller loggers, who come out over the flats.

Q. But those are not handled by the men who handle your operations?

A. I don't know as to that.

Q. How many men during the past three years have been doing such towing for you?

A. Well, a man by the name of Croft towed for us; the Bremerton Towing and Barge Company towed for us; the Shively outfit towed for us and I think somebody by the name of Wagner took two or three, and Mr. Haffner; and I want to say right now that every one of those companies were discharged, and not one of them quit.

Q. Who was it that you voluntarily gave the $16.50 rate to?

A. Mr. Croft.

Q. Mr. Croft never made any statement about losing money before that time?

A. He made a lot of statements to me; but he stuck on the job two years. I assumed that he was losing money all the time, but I discharged him; and after I discharged him he held me up to a thirty-days' notice; and from that time on, he was constantly and continuously asking for more money, the same as I was for my lumber; and he didn't get it, but he stayed. The $16.50 rate was given to him voluntarily, when he had not been asking for any increase, for some time prior to that time, at which time I

notified Mr. Calderhead that it was agreeable to us, if Mr. Croft would file an amended tariff at $16.50, which I understood that he did.

[fol. 43] Q. To whose advantage is it to have the logs cut to the lengths you do, and towed to your mill?

A. To our advantage.

Q. It saves you about how much per thousand?

A. I couldn't answer that.

Q. How much does it cost per thousand to scale them?

A. I think the Bureau's scale now is about nine cents, plus expenses.

Q. And the expenses would be how much?

A. I don't know. It depends upon whether we scale them at Ballard, or at the camp.

Q. What other differential would there be, in logs cut to scale and those not—to your advantage?

A. I don't understand your question.

Q. I say, what other advantage would it be to you to have your logs towed in these longer lengths?

A. Well, when I get those logs to the mill, I cut them up to suit the orders we are getting at the mill.

Q. And that is also to your advantage?

A. Yes.

Q. I believe you said that the rate was filed against you. Was that the $25.00 towing rate?

A. That is the rate we are protesting against. It was aimed at us, and no one else; no one else is interested in it.

Q. Was there any provision that you know of in the tariff, of the Tow Boat Owners' Association, and concurred in by the other operators, covering a per section rate, prior to the filing of this one?

A. I don't know anything about the Tow Boat Owners' rate, one way or the other. I have never read it.

Q. You have been complaining about the situation up there for some time, have you not?

[fol. 44] A. To whom?

Q. To everybody; to the Department, and to Mr. Calderhead, and to the Tow Boat Owners' Association?

A. No.

Q. And you never said a word about this rate, before this rate was put in?

A. I have been satisfied with the $16.50 rate.

Q. Didn't you know, as a matter of fact, that the tariff of the Northwestern Tow Boat Owners' Association carried no per section rate, prior to this time?

A. I have been told that, but I never looked into it.

Q. And you don't know that that section was put in to take care of you?

A. I don't know anything about that; all I know is, that I do not scale my logs in sections. I don't think there is any law in this country that compels me to scale my logs that way. Our logs are cut at our mill——

Q. Don't misunderstand me; I was not trying to say that you wanted to profit unduly, by scaling the logs in that manner; but I wanted the record to show that it was to your material advantage to have them towed without being scaled.

A. I don't know anything about that. I know it is an advantage to us to get our logs to our mill in three lengths; and I will tell you another thing, that if we were to scale the logs in three lengths, we would get a very much smaller scale than if they were cut into log lengths; so I can't see where you would get anywhere with that.

Q. I believe you stated that a number of operators have come to you and solicited this business at $16.50.

A. I didn't say that.

Q. I thought Mr. McNealy of the Association had offered [fol. 45] to haul them for twenty dollars.

A. He did.

Q. Now, is this a fact—how long have you been hauling your logs in the unscaled condition?

A. Since about the middle of May, three years ago.

Q. Had Mr. McNealy prior to that time been hauling or towing your logs, cut to saw log lengths and scaled?

A. Prior to that time, we were selling our logs on the open market, to anybody who wanted to buy them, and the mill didn't do the towing.

Q. But he was towing the logs?

A. Yes, for some other mill.

Q. And he was towing them on the per thousand basis?

A. Yes; they were all cut short lengths, except I think about one raft.

Q. And along about that time, you told Mr. McNealy that you desired to change your method of operation, and haul them in the longer lengths, and wanted him to do the hauling?

A. Yes; I was a stockholder in his company at that time.

Q. And at that time, he made some computation on the basis of the per thousand foot measure, and quoted you a price of twenty dollars?

A. Yes.

Q. And you didn't take it, and he didn't haul any of your logs?

A. No.

* * * * * * *

[fol. 46] W. T. Isted, on the stand, recalled.

Redirect examination.

Mr. Reynolds:

Q. These rates that you filed on this route with the Department, were they based upon any valuation made of the vessel operating over that route?

A. You mean from this place, Clifton?

Q. Yes.

A. The members of our Association were not interested——

Q. Oh, you can answer the qusetion yes or no.

A. No.

Q. That is what I am getting at.

Mr. Cleland: Let him go ahead and explain what he tried to say, and then he can qualify the answer.

Mr. Reynolds: Yes.

The Director: Go ahead.

A. (Continuing:) Well, there are none of our members who are interested in this rate for this tow for Mr. Stimson, and it was you gentlemen who wanted the rate fixed, because complaints were coming in from different tow boat

men, who were not members of our association; so that the Northwestern Tow Boat Owners' Association have had nothing to do with the fixing of this rate.

Mr. Reynolds: Well, I will ask you if it is not true that you did fix it, and send it to the Department?

A. No, sir.

Q. Who did fix the amount?

A. The amount was agreed upon between Mr. Calderhead and myself, by taking the average footage of the tow [fol. 47] and trying to make that about the same rate as the ordinary tows. It wouldn't——

Q. It was not, however, based upon any application?

A. No, sir, no application.

Q. And you could not, therefore, arrive at any conclusion as to what the necessary return would be for operating under that rate?

A. No.

Mr. Cleland:

Q. That is to say, you did not, in filing the rate, figure upon the rate of return upon any particular investment?

A. No, sir.

The Director: Well, was the rate structure embraced in this tariff as a whole worked out on the basis of yielding a reasonable return on the value of the various investments?

A. Well, we didn't base our rates that way. It is a question of a boat—— It takes us so long to make a tow; taking into consideration the climatic conditions, and the difficulty in getting the logs out, and the losing of them, and all that; and that is the basis on which they generally arrive at the rate.

Q. Well, is it your purpose to arrive at rates which will yield a reasonable return on the property devoted to the use of towing?

A. So far as the tow is concerned, yes; that is, the tow boat.

* * * * * * *

Mr. Reynolds:

Q. Then I understand that none of these rates—not only this rates, but also the other rates—were based on the value of the property operated in the performance of the service; and do you mean——

[fol. 48] A. Do you mean the property that performs the service?

Q. In other words, you didn't employ an engineer or anybody else to find the value of the investment, and then make a rate upon that investment?

A. Well, the committee that generally have these rates up before them for discussion, they base them, as I say, upon the actual time, and the difficulty of getting the proposition out.

Q. And if, in one case, it is more difficult to tow, that is taken into consideration—the tides, and the weather—and you charge for that?

A. Yes.

Q. And that is the way the rates are fixed?

A. Yes.

Q. And if it were easier to make this tow, you would charge less than if it were difficult?

A. Yes, absolutely.

Mr. Cleland: Well, is it not a fact that these rates were not made upon any such basis, but that they were made upon the average cost for such a haul—in other words, the committee who made up this rate, or any other rate, did not sit down and figure out what the cost of the movement from any particular place was, but they took the cost generally of the movements on Puget Sound, and that these rates are the average of the result of those costs?

A. That is the basis on which we base all our rates.

Q. In connection with this tariff—I don't see one in evidence yet, but I understand they are to be introduced—can we have one marked for identification?

[fol. 49] (Tariff introduced and marked, "Department's Exhibit No. 1.)

Mr. Cleland:

Q. Calling your attention to Department's Exhibit No. 1, by identification, is that the tariff of the Northwestern Tow Boat Owner's Association?

A. Yes.

Q. Who compiled or prepared that tariff, and had them printed and distributed—I mean, was it the Association, or somebody else?

A. Well, I told you this morning, we have been making changes in this tariff.

Q. You evidently don't get my question. After these rates were all made and drafted by the Department, who was responsible for putting them in that compact form?

A. The Department insisted that we do it.

Q. Well, who did it?

A. Well, it was done by the Department; they had it printed and we paid for it.

Q. What was the cost of that?

A. It was around $1.400.00 for the maps and book.

Q. And you had it printed—you paid for the printing of it; and you distributed copies of it?

A. We gave the Department copies, and I believe they sent them out to everybody who concurred in it.

Q. Do you know whether or not it is a fact that every tow boat operator on Puget Sound has concurred in the rates which are carried in that tariff?

A. I couldn't tell you that, no, sir.

Mr. Cleland: That is all.

Mr. Reynolds:

Q. Did I understand you to modify your answer with [fol. 50] reference to the valuation of the boats—do you now say there were any boats valued at all as a basis for the rates on this run?

A. Well, the question of the value does not come into it at all.

Q. Then there was no valuation made of any boats?

A. No.

* * * * * * *

A. To overcome this argument between counsel, I will say that I am not an operating man; this is not my business, to draw up these tariffs. There is certain work I do for the Association; but the actual naming of the rates, or any question of rates that comes up, is referred to the tariff committee, the men who are practical operators. I merely act in an executive capacity for these gentlemen, in looking after certain work.

Mr. Reynolds:

Q. And they are members of your Association?

A. Yes.

Q. And they fix the rates, and then hand them over to the Department?

A. They fix the rates, and the members have a meeting, and the members say, "Well, I think that is too much," or they say it is not enough, and so forth; and then they pass it up to me; and I send the amendment, or whatever it may be, to the Department and ask them to change the rates.

[fol. 51] Otis L. Shively, recalled.

Direct examination.

Mr. Reynolds:

Q. I want to ask you if, in addition to the advantages that exist in this particular towage, there is anything that you neglected to state this morning with reference to the tow, in which the towing could be done—*s*hate what other advantage there is.

A. Why, from our angle, there is the advantage that you can do it at any time. We have a large surplusage of logs at the camp, and you can go and get these when you have no other work to do.

Q. In other words, you can fill in, so that you can be using your boat for work that has to be done specifically, and let this towage run to suit your convenience?

A. Yes.

* * * * * * *

T. H. JENNINGS, after being first duly sworn, testified as follows:

Direct examination.

Mr. Ostrander:

Q. You are an employee of the Department of Public Works of Washington?

A. I am.

Q. And you are concerned with these tow boat operations here, and have been for the past year?

A. Yes.

Q. I hand you Department's Exhibit No. 1, and ask you if that is the tariff of the Northwestern Tow Boat Owners' Association, on file with the Department?

[fol. 52] A. It is.

Q. And when was that tariff made effective?

A. December 30, 1923.

Q. And how general is that tariff?

A. The tariff is intended to cover all towing on Puget Sound and adjacent waters.

Q. Have any concurrences been filed in this?

A. All tow boat operators operating on Puget Sound have concurred in this tariff.

Q. And has Mr. Shively concurred in the tariff?

A. He has.

* * * * * * *

Q. You have investigated the history of these tariff rates between Clifton and Seattle, have you?

A. I have traced the rate back as far as August, 1919. On August 6, 1919, the Northwestern Tow Boat Owners' Association Tariff No. 2 became effective. The tariff named a rate of $1.05 per thousand feet on fir logs between Clifton and Lake Union. On September 23, 1920, the Association issued Supplement No. 2 to their Tariff No. 2, that sought to increase the rates fifteen per cent. That supplement was suspended by the Department, and was later withdrawn. On June 1, 1921, effective June 1, 1921, Supplement No. 6 to Tariff No. 2 reduced the rate ten per cent. That made the rate at that time 94½ cents per thousand

feet. On May 31, 1923, a hearing was held, and Order No. 5544, dated Sept. 18, 1923, of which Exhibit No. 1 is a part, was made effective, and that named a rate of 94 cents per thousand feet. That tariff and order also cancelled all then existing rates for towing on Puget Sound.

[fol. 53] There was a hearing held on February 27, 1924; and Supplemental Order No. 5544, dated April 29, 19-, was made, authorizing Supplement No. 2 to become effective, May 21, 1924, and providing an additonal rate of $25.00 per section from Clifton to Lake Union, but did not cancel the 94 cent per thousand rate. Captain Croft filed his Tariff No. 1, effective November 16, 1921, naming a rate of $15.00 per section. He filed his Tariff No. 2, cancelling Tariff No. 1, effective April 2, 1923, naming a rate of $16.50 per section. His tariff filing was cancelled with others at the time Order 5544 was issued; and in addition to that he filed a cancellation notice on December 12, 1923, cancelling his tariff.

I think that covers the tariff filings, from August 6, 1919, up to the present time.

Q. Is there any tariff now on file with the Department, providing a rate other than the $25.00 per section, or 94 cents per thousand feet, between Clifton and Seattle?

A. Those are the only two rates that are in effect.

Q. How long has that been in effect?

A. The $25 rate has been in effect since May 1st of this year and the 94 cent rate has been in effect since Sept. 30, 1923.

Mr. Berger: It was in effect prior to that time, wasn't it?

A. No, the rate prior to that time was 94½ cents, in actual figures, because it was $1.05 less than ten per cent. The one-half cent was dropped at the time this tariff was made up. They didn't carry the half cent.

Mr. Ostrander: By whom was this $25 towing rate filed?

A. That $25 towing rate was brought up at the hearing of February 27 and discussed at that time, and was put into the tariff as a result of that hearing.

* * * * * * *

[fol. 54] Mr. Cleland: I want to ask him some questions.

Q. As I understand it, Mr. Jennings, the rate of $25 per section, or 94 cents per thousand, is at the present time and has been since the entry of the last order, an optional rate?

A. Yes.

Q. Which may be taken advantage of by anyone who desires to use it?

A. Yes, sir.

Q. Reference has been made here several times to the fact that the rate and the movement is from Clifton to Lake Union, and the Stimson Timber Company's mill on Lake Union. It is my understanding, which I would like to have you verify, if I am right, and if not, correct me, that these rates are established in zones, and that any point within a particular zone should use that zone rate; is that a fact?

A. If you like, I will read from the tariff, so as to be accurate. This tariff names rates on towing service to all points on Puget Sound, and adjacent waters. The tariffs which are attached to it are made a part of this tariff, and show the zones in which the—I will have to read that from the tariff. (Reads:)

"This tariff names rates on towing service between all points on Puget Sound and adjacent waters. The maps which are attached to and are a part of this tariff show the zones into which the entire territory is divided and all points within any one zone will take the rate for that zone.

"Specific rates are named between the following zones and all other zones: 1—Seattle Harbor, 15—Tacoma, 33—Olympia, 39—Edmonds, 42—Port Ludlow, 43—Port Gamble, 60—Port Angeles, 69—Everett, 83—Anacortes, 87—Bellingham, 104—Blaine, 107—Lake Union. See pages 6 to 17, inclusive."

[fol. 55] Mr. Cleland: That is all rates within a zone apply to all points?

A. Yes.

Q. Therefore, Clifton, or any point within a zone in which it is located will take that zone rate?

A. The zone you are referring to is Zone 53.

Q. How far is it by water towards Seattle—does that zone extend from Clifton?

A. Of course, it extends in the opposite direction.

Mr. Cleland: I mean by water.

A. I have no accurate figures on that; I think it is about 10 or 12 miles. I would not be qualified to state exactly.

Q. In other words, a point 15 miles from Clifton, as stated by Mr. Stimson, would fall within the zone of $25 per section, or 94 cents per thousand?

A. It would, undoubtedly.

Q. Do I understand that all tow boat operators, operating on Puget Sound, have filed concurrences in the tariff of the Northwestern Tow Boat Owners' Association?

A. To the best of my knowledge, yes.

Q. From any investigation you have made, and your knowledge of the facts, is this rate of 94 cents a thousand in line or in keeping with other rates on Puget Sound for a similar haul? Or do you care to answer that question—perhaps you don't.

A. It is in keeping with other rates. If anything, it is a little bit low, but I wouldn't want to go on record as saying it was exceptionally low.

Q. In your opinion, assuming the fairness of the 94 cent rate, would the $25 per section also be a reasonable rate for [fol. 56] the service in towing by the section?

A. If you were going to put in per section rates, I would consider that the rates would be about $25 per section.

• • • • • • •

The Director: I understood his last answer was, that the $25 per section would be about equivalent to 94 cents per thousand.

A. I didn't mean that exactly that way. I meant, in case we were to make per section rates over the Sound, that rate would have to be about $25 per section.

Supervisor Spinning: In keeping with the zone system?

A. Yes; in order to preserve the balance.

Mr. Cleland:

Q. Is it not a fact, that in the establishing of rates, or the making of rates, that it is one of the cardinal principles that rates are not made for particular movements or for

particular operations between certain points, but are built up as a comprehensive plan covering the total operations?

A. That is true; that is a recognized principle in rate-making.

Q. That is true, not only of tug-boat companies, but of street railway and other utilities?

A. All rates. In fact, that is set out in the original order of the Department.

Q. And in your opinion, would the Department be justified in departing from that principle in endeavoring to establish a rate for a particular movement such as is prayed for here?

A. Under no circumstances.

* * * * * * *

[fol. 57] Mr. Reynolds: The purpose of establishing a rate is to insure a reasonable return upon the invested capital, is it not, and also at the same time, as near as may be, be fair to the public?

A. Well, of course, there are a great many different items that enter into the fixing of rates.

Q. I know; but that is the ultimate end, isn't it—a fair return to the person who invests his capital in some business that is devoted to the public interest, so that there shall be a fair return to him; and a fair charge to the public—those are the two cardinal principles, are they not?

A. Yes, that they shall be fair, and also reimburse the utility.

Q. And make a fair return to the invested capital?

A. Yes, sir.

Q. What do you consider a fair return to invested capital?

A. It varies with different industries.

* * * * * * *

Q. Now, I understood you to say that $25 per section would be a fair and reasonable amount to charge for towing all sections from Clifton or that vicinity. Upon what do you base that, Mr. Jennings? Do you base it upon any valuation that you have made of any property that is being used in that particular business?

A. The rate of 94 cents per thousand which is in the tariff, was put in effect by order of the Department of Public Works, and it is stated in that order that that is a fair rate. In order to maintain the same balance of rates, if they were to put in per section rates all over the Sound, [fol. 58] that rate would have to be in the neighborhood of $25 per section, to keep from upsetting the balance that has been in practice for these years.

Q. What you mean by upsetting the balance is that in order to make as much money in towing logs from Clifton to Union Bay at 94 cents per thousand, you would have to charge $25 per section. Isn't that what you mean by upsetting the balance—in other words, so that they will balance; so that you will make just as much money either way; isn't that true?

A. I am not speaking of any one particular tow.

Q. Well, you are speaking of this particular business, and this particular towing, are you not, and telling us that it will upset the balance, or the uniformity——

Mr. Cleland: He means upsetting the balance of the other rates.

Mr. Reynolds:

Q. You don't mean to say that this business of Mr. Shively's and Mr. Stimson's in regard to towing logs from Clifton to Union Bay, will upset the balance of other towing companies, in other places on Puget Sound? You don't mean to say that, do you?

A. I don't understand your question.

Q. You don't mean to tell the Department that the price that Mr. Stimson pays Mr. Shively for towing his logs—nobody else towing logs there, and no other logs being towed—that the price that Mr. Stimson pays Mr. Shively would upset the balance upon Puget Sound?

* * * * * * *

A. Well, I suppose there is a contract for every tow that [fol. 59] is made. The supposition is that every tow is made on the Sound, and under that assumption, I don't see any reason why changing the rate from Clifton would not throw it out of balance, the same as to Port Townsend——

Mr. Ostrander: You mean out of balance with the established rates?

A. Yes.

Supervisor Spinning: You mean as established by order of May 1922, and supplements thereto?

A. Yes.

Mr. Reynolds: In other words, as I understand it now, the rates are fixed for certain distances in certain zones, all over the Sound; and those rates are fixed regardless of the conditions which exist in the particular case. It doesn't matter whether the towing is by the section or by the thousand; the purpose is to make the charge the same per section as it is per thousand; and in order to make the charge the same, you would have to charge $25 per section; is that right?

A. That may be your understanding; that is not mine.

Q. Well, what do you mean by telling the Department that in order to make it balance with the 94 cents——

A. I didn't say to make it balance with the 94 cents.

Q. Well, what did you mean by saying that if you don't charge it, you will upset the balance?

A. Yes.

Q. Well, then if there is no difference, it must bear the same proportion to that rate as the other does. In other [fol. 60] words, the man who does the work must make as much money when he tows at $25 per section as he does when he tows at 94 cents per thousand; that is what you mean, isn't it? In other words, the amount of money that he makes must be the same in either case, otherwise you upset the balance.

A. The towing returns to the industry as a whole must be the same.

Q. That is what I was getting at. Now, suppose that in the case of towing by sections, conditions should be different; that is, for instance, in Mr. Stimson's case the logs are all placed lengthwise, so that they tow more easily, and they are cut in longer lengths, so that they tow more easily; the person who is doing the towing can go and get the logs whenever he wants to; it is a fill-in business. Now, you

don't mean to say the rates should be the same as if the logs were put into the water crosswise, and it required more time and more power to make the tow?

A. I don't know that such conditions exist.

Q. Now, assuming that in the case of Mr. Stimson's logs here, that they are put into the water lengthwise, and assuming that the man who tows them is permitted to go and get them at his convenience, and assuming that they are easier to tow; that there is no such resistance in pulling the logs lengthwise as there is crosswise—you don't mean to tell the Department that the same rates should be charged as if they were put into the water crosswise, and it took more power, and more time?

A. Assuming that there was any one able to check up on it, there should be a different charge, perhaps; but I don't suppose there is any such case.

* * * * * * *

[fol. 61] Mr. Reynolds: * * * I want to ask this question; you know that it is true, do you not, that the only company on Puget Sound that is towing logs by the section is the Stimson Timber Company?

A. I don't know.

Q. Do you know of any other company?

A. I don't know of any other company, no.

Q. But it is the only company that you know of?

A. It is the only company I know of.

Q. How long have you been with the Department.

A. Since June 8, 1923.

Q. Are you familiar with its business?

A. I have been working at it.

Q. And you don't know of any other company than the Stimson Timber Company, that is towing logs by the section?

A. Not between zones.

* * * * * * *

H. O. BERGER, after being first duly sworn, testified as follows:

Direct examination.

Mr. Ostrander:

Q. What is your name?
A. H. O. Berger.
Q. What is your business?
A. Assistant traffic expert for the Department.
Q. How long have you been with the Department?
A. Since 1921.
[fol. 62] Q. And also, previous to that, you were engaged in the transportation business?
A. I was.
Q. You are familiar with the tariffs in this case, and the formal proceedings testified to by Mr. Jennings?
A. I am.
Q. Will you state to the Department the history of this tariff—by whom it was constructed, and how these rates were based, as far as you know?
A. Tariff No. 2, which was testified to by Mr. Jennings as having been filed and on file and in effect for a number of years prior to 1923, was proposed to be cancelled, and a new tariff issued, Tariff No. 3, which Tariff No. 3 was filed by the Northwestern Tow Boat Owners' Association. It practically named the same rates which were in effect in Tariff No. 2, but brought up all the amendments and changes in the previous tariff, so as to again start out with a new tariff, naming all the rates, so that it was not necessary to look at a great many supplements. Tariff No. 3 was filed partly upon the insistence of the Department, because of the inaccuracies in No. 2, because the amendments had been in effect a good many years, and they desired to have a tariff which was complete in detail. This tariff, I mean Tariff No. 3, was suspended by the Department, and notices in regard to the suspension and announcement of the hearings were mailed to all of the tow boat operators, as well as the Chambers of Commerce at Seattle, Tacoma, Bellingham, Everett, Anacortes and Olympia.

Supervisor Spinning: You said, "All tow boat operators"—that meant on Puget Sound?

[fol. 63] A. Yes. It was also sent to the Commercial Clubs at Port Townsend, Port Angeles, Blaine, and to the West Coast Lumbermen's Association and the Loggers' Information Bureau.

Q. Now, who are these last two parties?

A. The West Coast Lumbermen's Association is an association of lumbermen, and while I don't know, I believe it does include substantially all of the large lumber mills.

Mr. Reynolds: Now, are you speaking of Tariff No. 3?

A. I am, yes.

Q. That is the original hearing you are speaking of?

A. Yes.

Q. And not the one that fixed this $25 rate?

A. No. The Loggers' Information Bureau is an association of the principal loggers on Puget Sound, in fact, in the state of Washington, and the same with the West Coast Lumbermen's Association; and I think, so far as the Department was concerned, they tried to notify through these associations all parties who might be interested—all shippers who might be interested; also, they attempted, through announcements made in the newspapers, to notify all parties who might be interested in this hearing. A hearing was set and heard, and there were quite a large number of tow boat operators who attended the hearing; and while I don't recall exactly, the record will show that there were five or six or more large shippers of logs who were there, indicating that those people at least had received advice, in regard to it. The hearing discussed the matter of these rates, Tariff No. 3 was taken up, the rates as a whole were considered, and the order of the Department will stand as [fol. 64] the record of what the Department views were at that hearing. I think that recites substantially the items they took into consideration, in considering the rates named in Tariff No. 3, and they ordered that the Tow Boat Owners' Association issue a new tariff, which should be called Tariff No. 4. That is the tariff which was introduced into this record as Department's Exhibit No. 1.

This tariff was issued under the terms of that order, and it was later testified to by Mr. Jennings, that the supple-

ment No. 1, naming the $25 per section rate, was issued to supplement the order of the Department. Neither the original order nor the supplemental order were ever appealed from.

Mr. Reynolds: When was the hearing you have reference to held? on this $25 per section rate?

A. On February 27, 1924.

Q. Who was notified of that?

A. The same parties who were notified in the original case.

* * * * * * *

Mr. Ostrander:

Q. In this order fixing the $25 tow rate, the Northwestern Tow Boat Owners' Association were the applicants, I presume, who filed for the rates?

A. Well, in a sense, that is true, but largely this occurred; we had had complaints from various tow boat operators that the rates for towing Mr. Stimson's logs were being carried at less than the tariff rates. We attempted one or two times to check some of the parties, and find out whether they were complying with the tariff and with the law. We were always unable to find those operators at the time we [fol. 65] would send a man there, they being out on a tow, and being rather hard to get in touch with. The report came to us that charges were still being collected on a basis less than the tariff rate, and at this hearing, partially on the initiative of the tow boat operators, and partially on the initiative of the representatives of the Department, the question of the kind of a rate which should cover was introduced in that. At that time, the operators proposed a rate of $25 per section, and stated their reasons as to why that should be made. I cannot recite the testimony which was put in at that hearing, but nevertheless, the Department required the $25 per section rate to be put into the tariff.

Mr. Reynolds: Was Mr. Stimson notified of that hearing?

A. I don't know.

Q. Why was he not notified?

A. Well, I think the Department, in attempting to notify the Loggers' Information Bureau and the West Coast

Lumbermen's Association, would be doing as much as they possibly could to notify all of the shippers. It is manifestly impossible for the Department to notify every shipper who is interested in a rate.

Q. You know that Mr. Stimson was the only shipper at any time from that point?

A. No.

Mr. Cleland: The testimony shows that he was not; it was testified this morning that there were a lot of other people shipping from that point.

The Director: Go ahead.

A. I think I answered your question.

[fol. 66] Mr. Ostrander:

Q. Now, if you know, will you state to the Department the basis on—the basis of these rates in Tariff No. 4, how those certain rates were arrived at, in a general way?

A. You mean the factors that were brought up, or the testimony adduced?

Q. Yes; whether or not they were based on valuations, or whether or not they were historical rates.

A. Well, I think the Department in their original order set out to a large extent what they took into consideration; that they took into consideration there practically all factors which are used in determining what a reasonable rate might be. They were, of course, considering the generally low level of towing on Puget Sound, and in doing so, they would have to ascertain, to some extent, all the factors which would have to be taken into consideration in naming rates for towing.

Q. Now, you are just citing the conclusions from the Department's order?

A. Yes.

Q. Well, I think that the order speaks for itself.

* * * * * * *

Q. Was Mr. Shively before the Department at that time?

A. He was served with notice.

Q. Was he there, and testified?

A. I don't know—he was not, that I know of.

Q. Was Mr. Stimson there, or did he testify?

A. No.

[fol. 67] Q. Was any valuation made of any property involved in this transportation?

A. No actual valuation, ascertained by engineers, was secured at that time. However, evidence was introduced.

Q. Who testified as to the value of any property?

* * * * * * *

A. (Continuing:) The testimony, I believe—I am reciting this from memory—I have not looked over the record for some time, but I do believe that testimony was introduced by various tow boat operators as to whether the rates which were named in Tariff No. 3 were fair and reasonable, and that when they said fair and reasonable, they considered value as one of the elements.

Q. But there was no valuation made?

A. No, there was no actual valuation, ascertained by engineers of the Department, or, so far as I know, by any one else, which was introduced.

Q. Was any specific net return discussed or agreed upon by the Department at that time?

A. Well, I don't think it would be agreed upon by the Department. I think the rate of return was discussed.

Q. What was the rate base?

A. I am sure I don't remember. There was nothing in the order reciting what it might be.

Q. Well, what is the correct rule for this kind of business?

A. Well, I wouldn't know. It would seem to me that the Department has in utility cases and in transportation cases, that is, rail transportation cases, fixed at various times a rate of eight per cent—it might be less in some cases; it [fol. 68] has been more; it would depend upon the class of business, as to what a reasonable rate of return might be, according to my idea.

Mr. Cleland: Well, the rate of return for a tow boat, or any boat, should be greater, should it not, than for rail, or any other land transportation utility company—in other words, there is a greater element of risk, which should be taken care of by a greater rate of return?

A. Well, I think that some consideration should be given to the fact that there is a greater element of risk in operating over water, as compared with operating on land. There

is more danger and more hazard; that is recognized by the laws which are in effect.

* * * * * * *

Mr. Cleland: Now, in this matter of giving notice, I think I have some familiarity with the practice down there; as I recall it, there is nothing in the statute anywhere, and no rule, which requires the Department to give notice to individual shippers or consumers. That would be an impossible or impracticable thing to do; isn't that a fact?

A. Yes.

Q. Isn't it the practice of the Department, however, and hasn't it been the consistent practice of the Department for years, to give notice not only of proposed rate increases, but of gas, electric, telephone or any other kind of hearings, to chambers of commerce, commercial clubs, city [fol. 68½] authorities and other public officers and bodies representing the individual user?

A. It has.

Q. And that *that* is invariably done in all cases?

A. Yes, sir.

Q. And that it would be impossible to give notice to thousands of people who might use the service of any transportation or utility company?

A. It would be.

Supervisor Spinning: Well, in this case, were there not notices given to the lumber interests, and the sawmills, and the tug boat interests?

A. Yes; I testified that notices were mailed to the Lumbermen's Association and the Loggers' Information Bureau.

Supervisor Spinning: That was in addition to all of the known tow boat operators operating on Puget Sound?

A. Yes; and so far as I have known about the practices of these associations, and I was with the Chamber of Commerce of Tacoma about a year and a half—while I was there, I know it was the practice there, upon the receipt of any notice from the Department of Public Works, of any hearing, that the Chamber of Commerce, and I believe all the rest of the associations, would make an attempt to notify all of the members who were interested. That is

the general understanding upon which those notices are mailed.

Q. Well, wasn't it the purpose or practice of this Department to give notice to all parties interested in a controversy of this or any other character coming before it?

A. Yes.

* * * * * * *

[fol. 69] LINDLEY DAVIS, after being first duly sworn, testified as follows:

Direct examination.

Mr. Cleland:

Q. What is your business?

A. Manager of the Carey-Davis Tug & Barge Company.

Q. Do you operate on Puget Sound?

A. Yes.

Q. Do you engage, among other things, in the towing of logs?

A. Yes.

Q. How many boats do you operate in that service?

A. I think we are operating thirteen at the present time, in various services.

Q. Are you familiar with the tow from Hoods Canal, in the neighborhood of Clifton? Or the Stimson camp, to Seattle and Lake Union?

A. Yes.

Q. In your experience, in that connection, what you say in reference to the number of tides which must be encountered and passed, in bringing a tow of logs from Clifton, or the Stimson camp, to Lake Union?

A. Well, we always figured, when I was on the boats, we always figured three ebb tides coming out from the bluff near Clifton; that is where the ebb tide becomes a fair tide; we took three tides to the bluff, and then if we had a big tide and fair wind, we could make it from there to Ballard in one day.

Q. Did it make any difference, in that operation, whether you were hauling eight or thirty-two sections, in the length

[fol. 70] of time, in tides, etc.—in other words, could you bring three sections over in less than three tides?

A. Well, I think possibly you could; I don't know that I ever towed 32 sections myself. I am quite sure I never towed that many from Clifton. It seems if you left there at low water, you could come with two. You could save six hours, with a light tow, or with one ebb tide.

Q. With an eight-section tow?

A. Yes. When I towed, very few 8-section tows were made; we got ten or twelve.

Q. Would that be true of a 16-section tow?

A. I don't think it would make much difference; instead of leaving at high water, we would leave possibly at half-ebb, and lose part of one ebb, and make it in six hours' difference.

* * * * * * *

A. L. McNealy, after being first duly sworn, testified as follows:

Direct examination.

Mr. Cleland:

Q. Where do you live?

A. Seattle.

Q. What is your business or occupation?

A. Tow boat business.

Q. You have the Pacific Tow Boat Company?

A. Yes.

Q. Are you a member of the Northwest Tow Boat Owners' Association?

A. Yes.

[fol. 71] Q. How long have you been operating tow boats on Puget Sound?

A. About twenty years, I think.

Q. What portion of that time have you been operating, in towing logs?

A. All that time.

* * * * * * *

Q. Coming now to rates, and particularly the rates from Hoods Canal, the Clifton zone to Seattle or Lake Union, I wish you would just proceed in your own way, and give us something of the history of log rates on Puget Sound, how they were made up, and how the particular rate in question here of $25 per section was made up, and how it was substantiated.

A. Well, when I first came in contact with the towing business, about twenty years ago, we had a little card. There were about a dozen points mentioned on that card, and those points covered the extreme ends of the Sound, and some intermediate points. In those days, there were only two or three of us who were in the towing business, and there were very few logging camps and mills; and of course we didn't need so many; we had to cover the territory, but we didn't need to cover as many points as we do now. But gradually, we had to make intervening rates, which we made by splitting the different distances, and sometimes we had to extend the rates to points where we had not gone before. And we gradually evolved ourselves, until we had Puget Sound pretty well covered. That was really before there was any Public Service Commission in existence.

[fol. 72] Well, when the Commission came along, we had to be a little more specific with our rates; but these same figures were used right along, and have been used for forty years, and before that, I guess. We might add a nickel for that trip, or take a nickel from it, as conditions and times warranted. And then, a few years ago, conditions came about where we had to have more revenue, and we were rather puzzled how to get it; so we conceived the idea of separating the fir, and spruce, and hemlock, and cedar, and charging different rates. If we were towing a section of fir and a section of cedar, and a section of hemlock, we would only have half as much in it as a section of fir, and we were spending just as much time on it, and so at that time, I took and went over all my books, of several years' operations and separated them into the number of feet in each tow, of fir, spruce, hemlock and cedar—and that was the time we filed this rate, and changed our methods of doing the thing, in charging a different rate for spruce, fir and cedar, basing it upon this computation

I took from my books; and also what the American Tow Boat Company took off from their books at the same time, I think. The total of all these tows, divided by the number of trips we made, proved that the average tow, as we towed on Puget Sound amounted to about 450,000 feet—that is what it would scale.

Now, the rate at Clifton, or the rate at Union City and Potlatch, where this 94-cent rate stands to-day, ended at Union City, and it was at that time ten cents additional when we went above Union City. When Mr. Stimson put his camp in, up in above Union City there, he asked me if I couldn't see that he got the Union rate, the same as Pot-
[fol. 73] latch, so that he could compete with those people; and I told him I thought we could, and I would try to see that it was maintained that way; and that is the way it stands to-day on the tariff. Later on, I was requested by the Association—at least, I was on the tariff committee—that we should make a per section rate, that would be fair and reasonable, from this zone that Clifton is in, to Lake Union, and I submitted that rate of $25 per section, based upon these statistics that I had taken off from my books, on the towing I had done, which showed that we had got on the average 450,000 feet to the tow. You take 450,000 feet to a tow, and multiply that by 94 cents, and you get about $423.00; and you take 16 sections of logs at $25 per section, and you have $400.00; so that he has a little the best of us even at that. During all of these years that we have towed on these rates, we have found that we have made a little money; not very much, but we have been able to make a little; and it is the average of the tows that has made it for us.

Mr. Cleland: In other words, there are operations where it is almost essential that you perform the service without receiving a fair return, and averaging that up against other operations, where on account of the favorable weather and tide conditions, you are perhaps able to make a better return, the whole thing comes out upon the comprehensive plan, which enables you to make something on it all?

A. Yes.

[fol. 74] Q. But it is impossible to pick out any particular movement, and say, "We make a fair return on it?"

A. You can pick out a particular movement on Puget Sound where if you keep at it long enough, it will break you; and you can pick out particular movements where they are sure to break you; but where you take the average of the tows, it will make you a fair profit on the average, as a whole.

Q. The American Tow Boat Company man that you mentioned—what is his name?

A. Captain Ramwell.

Q. They have been operators here for years on the Sound?

A. I think, in fact, I know that they were here when I came.

Q. And do they keep their records the same as you keep yours, so that they could give you the various figures on their operations?

A. I think they do.

Q. And the figures on which these rates were made, or estimated, were of course taken from the books of the companies who have been operating on Puget Sound for years, and applied to the different propositions?

A. The figures upon which we are towing to-day, outside of that $25.00 rate, were made up from rates which were made forty years ago, only just as we added to it or took away from it, as good or bad conditions came along, and we found there was necessity for getting more money out of our operations.

Q. What in your opinion is that rate of 94 cents per thousand, or $25 per section, to the Stimson camp—or from the Stimson camp to Lake Union—is it a fair and reason-
[fol. 75] able rate for that service?

A. It is the lowest rate that I know of on Puget Sound, for the distance and conditions, on which we have to tow.

Q. What are those conditions?

A. Taking on an average three tides to come out of Hoods Canal, and two to come up here. We have bad weather there lots of times. The average time, to my notion, is longer on that tow than on other tows on Puget Sound, according to that rate.

Q. You operated over there at one time, did you?

A. No; I am not a master mariner.

Q. Is there anything else that occurs to you in connection with this matter, which I have overlooked?

A. No, I don't think so.

Mr. Cleland: That is all.

Cross-examination.

Mr. Reynolds:

Q. I want to ask you how the public are interested in this business. Say, for instance, that you are hauling logs, or towing them for Mr. Stimson; how would the public be interested in that?

A. Well, we are dealing with the public, as I understand it.

Q. Well, in what particular are they interested? For instance, say I am a member of the public. I am not in the business of manufacturing lumber, or of manufacturing flour; but I am a member of the public, I might say; but you are interested as a tow boat man, in getting the money out of towing logs; and I can see how Mr. Stimson is interrested in getting the logs into his mill, and cutting them into lumber; but can you explain to me how the general [fol. 76] public are interested in your contract, assuming that you have a contract with Mr. Stimson for towing logs?

A. I couldn't tell you anything about it.

Q. You couldn't explain it?

A. No.

Q. You don't know how the public are interested?

A. No.

HARRY RAMWELL, after being first duly sworn, testified as follows:

Direct examination.

Mr. Cleland:

Q. Where do you live?

A. At Everett.

Q. What is your business?

A. Tow boat business.

Q. How long have you been in the tow boat business?

A. That is a good many years ago, so long that I am afraid to tell you.

Q. Well, fifty years?

A. Yes, pretty near that, steamboating and tow boating.

Q. You have been in the business for a long time?

A. Yes.

Q. In your operations, have you also towed logs for logging companies, different companies?

A. Yes.

Q. During that entire time?

A. Yes, sir.

Q. Do you have boats which are assigned to that respective class of towing?

A. Yes.

[fol. 77] Q. And they have been, through all that time, towing logs?

A. Yes.

Q. Are you familiar with the boat known as the Ketchican II?

A. Yes.

Q. Do you know the Catherine M.?

A. I think I have seen her; I am not familiar with her.

Q. How many boats do you have in your log-towing operations?

A. Well, all told, about 27. That is, including everything.

* * * * * * *

Q. I understand that the point known as Foulweather Bluff is something that is not found in the ordinary places you tow to; that is, it is a dangerous point on this particular run?

A. Yes, it is.

Q. It is necessary to come by Foulweather Bluff in making the run from Clifton to Lake Union?

A. Yes.

Q. Is that considered one of the dangerous points on Puget Sound? I mean from a towing standpoint?

A. Yes; there are quite a number of dangerous points on Puget Sound from a towing standpoint, and that is one of them.

Q. Would you say that that was one of the most dangerous?

A. In the winter time it is, and I might say in the summer time, if you get a strong westerly wind.

Q. You heard the testimony here, and are familiar with the fact that there is a rate of $25 per section from that zone into Lake Union?

A. Yes.

Q. What is your opinion of the fairness and reasonableness of that rate for that service?

[fol. 78] A. I think it is a very reasonable rate.

Q. You are familiar with the general makeup of rates on Puget Sound as testified to by Captain McNealy?

A. Yes.

Q. And your conclusions coincide with his?

A. They do.

* * * * * * *

CHARLES C. CROFT, after being first duly sworn, testified as follows:

Direct examination.

Mr. Cleland:

Q. Where do you live?

A. Seattle.

Q. What is your business?

A. Master mariner.

Q. You have been engaged in the operation of tow boats on Puget Sound?

A. I have.

Q. How long have you been in that occupation or business?

A. 15 years.

* * * * * * *

Q. Are you familiar with the operation of towing logs from Stimson's camp on Hoods canal to Lake Union?

A. Yes.

Q. Did you ever do that work?

A. I did.

Q. How long did you do it?

A. Two years.

[fol. 79] Q. What were the rates under which you hauled the logs?

A. In the beginning, I think it was $15.00 per section.

Q. That was in 1920?

A. In 1922.

Q. Was that rate subsequently raised?

A. Yes, there was a 10 per cent increase in 1923.

Q. Making it $16.50?

A. Yes, sir.

Q. How many sections did you bring at a time?

A. An average of 16 sections per tow.

Q. How many tows were you able to make in a month?

A. On an average, three tows per month.

Q. How much of your time was required, and how much of the time of your boat was required, in rendering that service?

A. Well, it occupied almost the entire time, under the conditions.

Q. What were the conditions?

A. Well, the conditions were that any time I was compelled to take eight sections, in order to get the logs from the camp down to the mill, any time, to keep the mill running.

Q. Why were you compelled to take right of them—I thought Mr. Shively testified you could do this, when you were not doing anything else?

A. Well, many times the conditions varied; many times they would have just enough rafted to run the mill, by getting them in there in a rush. Many times I had only two days' time to get them in.

Q. Did you have a great deal of time for the further use of your boat, during the time you were operating over there?

A. No, I had practically no other spare time.

[fol. 80] Q. You have, however, operated your boat in other movements during that time?

A. Very little.

Q. You did some?

A. Yes.

Q. You heard Mr. Stimson's testimony this morning, to the effect that he voluntarily increased that rate from $15 to $16.50?

A. Yes, when I told him I was going to quit, and pull off the job, he offered me ten per cent more, when I expected a 25% raise.

Q. And what about his discharging you?

A. Well, when the time came that I finally demanded more money, he said, "Well, I can get another boat to do that work at that price," so I challenged him to get one, and his man, Mr. Fisher, who worked in the office, called up the Atwood-Wagner Tow Boat Company, to prove to me that he could get a boat to do it at that price; so I had a chance to get a little more——

* * * * * * *

MARTIN HEFNER, after being first duly sworn, testified as follows:

Direct examination.

Mr. Cleland:

Q. Where do you live?

A. Bremerton.

Q. What is your occupation?

A. Tow boating.

Q. How long have you been in that business?

A. Sixteen years.

[fol. 80½] Q. On Puget Sound all the time?

A. Yes.

Q. You have been towing logs most of the time?

A. During all that time. We don't make that our regular business, though; we tow scows more than we do logs.

Q. Are you a member of the Northwestern Tow Boat Owners' Association?

Mr. Cleland: I want to ask Mr. Croft that same question—he will state for the record that he is not.

Q. Did you handle logs for the Stimson Timber Company from Clifton to their mill in Lake Union at one time?

A. Yes.

Q. For how long?

A. I believe about three months.

Q. What was the name of your boat?

A. La Sirena.

Q. 100 horse power, Fairbanks, Diesel engine?

A. Yes, sir.

Q. When was she built?

A. I don't know that right now; I could not say.

Q. You took up the contract of hauling logs for the Stimson Timber for the Stimson Timber Company, or took over that operation, after some one left?

A. Yes.

Q. Who was it?

A. A fellow by the name of Captain Andrews got the business, and later on turned it over to me.

Q. And you succeeded him?

A. Yes.

[fol. 81] Q. And you handled it for $16.50 a section?

A. Yes.

Q. How many sections did you handle on each tow?

A. 16 every time.

Q. How many trips did you make per month?

A. We averaged about three trips per month. They were not running very fast at that time, I don't believe.

Q. How much of your time were you able to devote to other transportation with that boat?

A. None.

Q. You operated her exclusively in that service at that time?

A. Yes, sir.

* * * * * * *

Q. Were you able to make a profit on your operation?

A. No, we didn't make no money on that.

Q. In determining that, no consideration whatever was given to the loss of tows, or picking them up?

A. Never had any.

Q. Did Mr. Stimson fire you, too?

A. No, he didn't fire me; I gave him notice.

Q. What did you tell him?

A. I told him we had another job that we could go on, and we would try to get him another boat to put on the job; and I got him the Grizzly II; and I quit.

Q. If you had been making money, would you have quit?

A. Well, if I could have gotten about $25 per section, we would have continued.

Q. Would you take the job back again at $16.50?

A. No.

[fol. 82] Cross-examination.

Mr. Reynolds:

Q. You at that time were already contracted to somebody else, and that is the reason you quit?

A. Well, I'll tell you frankly, a man couldn't make any money on that job.

Q. That was after you—that was, however, the reason you quit at that time—your boat was contracted to somebody else; you couldn't carry out your contract with Mr. Stimson and at the same time carry out that contract?

A. No; we worked for these people before and done pretty well, and went back to them.

Q. Were you working for these same people at the time you were towing for Stimson?

A. No.

* * * * * * *

G. S. Atwood, after being first duly sworn, testified as follows:

Direct examination.

Mr. Cleland:

Q. Where do you live?

A. Seattle.

Q. What is your business?

A. Tow boat business.

Q. What is the name of your boat?

A. The Venture, and the Cherry.

Q. Are they both used in towing logs on Puget Sound?

A. Yes, sir.

Q. What sort of a boat is the Venture?

A. A steamboat of approximately 200 horse power.

[fol. 83] Q. Have you ever hauled any logs for the Stimson Timber Company, from Clifton to Lake Union?

A. Yes.

Q. How many trips?

A. Three trips.

Q. At what rate?

A. $16.50.

Q. Per section?

A. Yes, sir.

Q. What kind of weather did you have?

A. We always had good weather; we were able to come around the Bluff every time within twelve hours after we got down there.

Q. What was your experience in the matter of making a profit at $16.50?

A. There was no money in it.

Q. Why did you do it?

A. At that time there was very little doing; it was winter, and we had a crew sticking around, and we thought we might make expenses; and we tried it three times, and found there was no profit in it.

Q. And you didn't do it any more?

A. No.

Q. What would you say to a rate of $25.00 per section, as to whether or not you would consider that a fair rate for that service?

A. Well, in comparison with others, it is not high. You take rates into Everett from the same place; it takes about as long to tow them, and we generally get $400, and we don't have the locks to contend with.

[fol. 84] Q. What is the delay in getting through the locks?

A. It is generally figured among tow boat men that it takes six hours to go through the locks; sometimes you can do it in four hours.

Cross-examination.

Mr. Reynolds:

Q. You get $400.00 for a tow to Everett?
A. Yes.
Q. Where from?
A. Well, I took a tow the other day from a camp that I don't think is more than a mile above Mr. Stimson's camp, and wouldn't take any longer.
Q. And you got $400 for it?
A. Yes, $460.00.
Q. How long did it take you?
A. We got down to the Bluff, and we had to wait there six hours, I think, on account of the weather; and we took four days, I think.

* * * * * * *

[fol. 85] In Superior Court of Thurston County

[Title omitted]

Judgment—Filed January 15, 1925

This cause coming on regularly for hearing on December 19th, 1924, before the Honorable D. F. Wright, Judge of the above entitled court, upon the return of the Department of Public Works of the State of Washington, to the writ of review heretofore issued by this court in this cause, the plaintiff appearing by Mr. C. A. Reynolds, Ballinger & Hutson, its attorneys, and the respondents appearing by John H. Dunbar, attorney general, H. C. Brodie, assistant attorney general, and R. E. Ostrander, of counsel, their attorneys, and the court having duly considered the return of said respondents to said writ, and all of the files, records and proceedings herein, and having heard the arguments of counsel and being fully advised in the premises,

It is ordered that the findings, opinion and order of the Department of Public Works, and the respondents herein, made and entered in that certain cause before said department, entitled "Stimson Timber Company, complainant, v.

Northwestern Two Boat Owners Association, and Shively Tow Boat Company, respondents, No. 5713," be and they are hereby affirmed.

To the foregoing judgment plaintiff excepts, and an exception is hereby allowed.

Done in open court this 15 day of January, 1925.

D. F. Wright, Judge.

Approved as to form. Reynolds, Ballinger & Hutson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 86] In Superior Court of Thurston County

[Title omitted]

Notice of Appeal—Filed January 21, 1925

To the above-named respondents and to John H. Dunbar, Attorney General; H. C. Brodie, Assistant Attorney General, and R. E. Ostrander, attorneys for said respondents:

Take notice that the above named plaintiff does hereby appeal to the Supreme Court of the State of Washington from that certain Final Judgment entered by the above named Superior Court of the State of Washington for Thurston County in the above entitled cause, in which said Final Judgment said Court affirmed the Findings, Opinion and Order of the Department of Public Works and Respondents herein, made and entered in that certain cause before said Department, entitled: "Stimson Timber Company, Complainant, vs. Northwestern Towboat Owners Association and Shively Towboat Company, Respondents, No. 5713." That this Appeal is from the whole and each and every part of said Judgment.

Reynolds, Ballinger & Hutson, Attorneys for Plaintiff and Appellant, Stimson Timber Company, a Corporation,

Received a copy of the within notice of appeal this 21st day of January, 1925.

John H. Dunbar, Attorney General; H. C. Brodie, Asst. Attorney General, Attys. for Respondents.

[File endorsement omitted.]

[fol. 87] Bond on appeal for $200.00, approved and filed January 22, 1925, omitted in printing.

[fol. 88] In Supreme Court of Washington, en Banc

No. 19207

State of Washington ex Rel. Stimson Timber Company, a Corporation, Relator,

vs.

E. V. Kuykendall, as Director of Public Works of the State of Washington; Walter B. Whitcomb, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, and Together Constituting the Department of Public Works of said State, Respondents

Opinion—Filed Feb. 25, 1926

This is an appeal from a judgment of the superior court affirming the findings of the Department of Public Works after hearing upon the question of the reasonableness of a tariff rate for towing logs.

Appellant is engaged in the logging of timber on Puget Sound. In its operations it is required to have its logs towed from Clifton, in Mason County, to Union Bay, in King County. The rate provided in the tariff is $25 per section. Appellant has been having its towing done by different tugboat companies at a charge of approximately $16.50 per section, and at the time of the hearing had a verbal contract with the Shively Towboat Company to do its work for that amount. Evidence was introduced upon

the question of the reasonableness of the rate, and the Department found that the $25 rate was reasonable and just under all the circumstances.

It will be unnecessary to detail all the evidence presented upon which the Department's findings were based, but it is sufficient to say that the findings conclusively established that the Shively Towboat Company, although towing and [fol. 89] agreeing to tow the logs at the rate of $16.50 per section could not continue to do so except at a loss.

There are a great many factors which go to make up the overhead and running expenses of the towboat business which the towboat company had either failed or refused to take into consideration, which, if adopted, conclusively established that the logs could not be towed at a profit for $16.50 per section. A careful examination of the record demonstrates that the price fixed by the Department was reasonable under all the evidence adduced.

The most serious objection raised by appellant, however, arises, not so much upon the amount of the rate established as upon the question of whether any rate at all could legally be established. Appellant strenuously contends that a towboat engaged in the towing of logs is not devoting its property to a public use so as to make it a common carrier within the purview of the controlling statutes, (Rem. Comp. Stats. Sec. 10344) or in a business "affected with a public interest" as defined by this and other courts of last resort. The statutes controlling are as follows:

Sec. 10344:

"The term 'common carrier' when used in this act, includes all railroads, * * * steamboat companies, * * * and every corporation, company, association, joint stock association, partnership, and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, owning, operating, managing or controlling any such agency for public use in the conveyance of persons or property for hire within this state. * * *

"The term 'steamboat company,' when used in this act, includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever,

owning, controlling, leasing, operating or managing any vessel over and upon the waters of the state. * * *

"The term 'vessel', when used in this act, includes every species of water craft, by whatsoever power operated, for the public use in the conveyance of persons or property for hire over and upon the waters within this state, including tow boats, tugs, scows, barges, and lighters (excepting row [fol. 90] boats and sailing boats under twenty gross tons burden, open steam lauches of five tons gross and under, and vessels under five tons gross propelled by gas, fluid, naphtha or electric motors).

"The term 'public service company', when used in this act includes every common carrier * * * as such terms are defined in this section."

Section 10345 reads in part as follows:

"All charges made for any service rendered or to be rendered in the transportation of persons or property, or in connection therewith, by any common carrier, or by any two or more common carriers, shall be just, fair, reasonable and sufficient. * * *"

Section 10350 reads in part as follows:

"Every common carrier shall file with the commission and shall print and keep open to the public inspection schedules showing the rates, fares, charges and classifications for the transportation of persons and property within the state between each point upon its route and all other points thereon. * * *"

Section 10352 reads in part as follows:

"The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission. * * *"

Section 10354 reads in part as follows:

"No common carrier shall charge, demand, collect or receive a greater or less or different compensation for trans-

portation of persons or property, or for any service in connection therewith than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time. * * *"

Section 10356 reads as follows:

"No common carrier shall, directly or indirectly, by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered in the transportation of persons or property except as authorized in this act, than it charges, demands, collects or receives from any person or corporation for doing a like and contemporaneous service in the transportation of a like kind of traffic under the same or substantially similar circumstances and conditions."

It will be seen from the above quoted sections that certain properties are declared by statute to be common carriers; that among these properties are steamboat companies; that the word "vessel" as used in the act includes any "towboat" operated "for the public use in conveyance of persons or propery for hire over and upon the waters [fol. 91] within this state." It is contended that at common law towboats were not considered common carriers, and that therefore they could not be so considered here. It may be admitted that at common law towboats were not common carriers by the weight of authority; but that authority has no controlling force in our present inquiry, for we must determine whether, under the statute, a towboat is a common carrier. Since the statute says that a towboat operated for a public use is a common carrier, it remains only to be determined whether or not the towboats in question were engaged in a public use.

The evidence shows that the Towboat Company has two boats, and some barges, which it uses in its business. The business of the appellant is sufficient to take the greater portion of the time of the larger of these towboats. The Towboat Company, in common with a large number of like companies, in compliance with the law heretofore quoted, filed its tariff rates for towing. This tariff provides for a wide and varying schedule for work on Puget

Sound, governed by different zones. The tariff provides rates, not alone for the towing of logs, but for the towing of piling, boom sticks, ships, dismantled vessels, scows, barges, pile drivers, dipper dredges, suction dredges, and rates per hour for assisting, shifting and docking vessels, scows and barges. It will thus be seen that by its tariff the Towboat Company is engaged in practically all the different kinds of work which can feasibly be performed by a towboat. It must be apparent that one who holds himself out to the world through a regularly filed tariff as willing to perform all the manifold forms of towing which the public may reasonable be expected to require, is devoting his property to a public use. It is difficult to see how it could be more fully devoted to the public use. Appellant contends that it was not the intention nor within the province of the legislature [fol. 92] to place towboats under the provisions of this act and make them common carriers. That it was the intention of the legislature to do so is demonstated by words so clear and unambiguous as to be beyond cavil. Whether it was within the province of the legislature so to do without the act being unconstitutional as urged by appellant, is another question.

The principal objection raised to the constitutionality of this statute centers around the provision of the Federal Constitution that no property shall be taken without due process of law. Appellant admits that there are certain instances where private property may be regulated, even to the point of specifying the rates to be charges for services, where such businesses are affected with a public interest, or devoted to a public use, but contends that the towboat business is not of that character.

The lading case in this country upon the question of the right to regulate the rates charged for service is Munn v. Illinois, 94 U. S. 113. In that case the legislature of Illinois passed an act providing that all elevators or warehouses accepting grain for storage for compensation were declared to be public warehouses, and the rates subject to regulation. The act being upheld by the supreme court of Illinois, the case was appealed to the United States Supreme Court, where, in a very able and exhaustive opinion, the constitutionality of the act was upheld. The decision was grounded upon the fact that the storage of

grain in elevators was a business affected with a public interest, and therefore subject to regulation.

The same question came before the same tribunal in Budd v. New York, 143 U. S. 517, where the court, after reviewing a large number of decisions of other courts of last resort, as well as its own, that had been made in the intervening period of time (sixteen years) held that, the act of the New [fol. 93] York Legislature similar to that of the Illinois legislature, was constitutional; that it did not contravene the provisions of the Federal Constitution, and reaffirmed the doctrine that the handling of grain and the storage thereof in warehouses, was a business affected with a public interest. Two years later, there was presented to the same court the right of the legislature of North Dakota to enact a law of similar character. In that opinion, Brass v. Stoeser, 153 U. S. 391, the court again reaffirmed its previous decision in Munn v. Illinois, supra, and Budd v. New York, supra. The appellant in that case sought to distinguish the facts therein from the Illinois and New York cases, upon the ground that in both of them the act regulated warehouses or elevators in large commercial centers, where the danger of monopoly was great and apparent, whereas, in the North Dakota case the act applied to the whole state. Attention was called to the fact that land was cheap in North Dakota, and that it was possible to have elevators at a very moderate price in any section of the state, and that the state of facts demonstrated that there could be no monopoly. The Supreme Court, however, refused to accept this as distinction, and pointed out that if the Illinois statute and the New York statute had applied to the whole state rather than to large commercial centers like Chicago and Buffalo, the act would still be constitutional. The court called attention to the fact that these different situations were proper matters to be addressed to the legislature, since upon them devolved the determination of the policy of the law, but that it could have no controlling effect upon courts whose duty is confined to a consideration of the power of the legislature to pass a law, not as to its wisdom or the soundness of its policy. In these cases will be found the keynote for our consideration of the questions here presented.

Appellant urges that the situation presented in the case at bar arose, not through a monopoly of the tugboat owners

[fol. 94] who had raised the price of towing to those who required such services, but that the legislation was enacted at the behest of the towboat owners themselves who desired to be regulated. It was said in argument that to justify the legislature in passing this law a monopoly must be apparent; that a condition must exist that requires the intervention of the hand of the legislature for the protection of the public. But as we have seen from the foregoing decisions, the question of whether or not a monopoly actually existed is not a controlling feature. Nor can courts know what considerations were pressed upon the legislature to justify the passage of the act. It is enough for us to follow the holding in Munn v. Illinois, supra, where the court said:

"For our purpose we must assume that if a state of facts could exist that would justify such legislation it actually did exist when the statute under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute then we might declare this one void because in excess of the legislative power of the state; but if it could we must presume it did. As to the propriety of legislation in force within the scope of the legislative power the legislature is the exclusive judge."

It will readily be seen, then, that it makes no difference whether a monopoly existed, whether a demand for the regulation came from the people who elected their representatives, from the towboat owners, or from those who require their services. It seems too plain for argument that if the prices charged were exorbitant it would vitally affect what is one of the largest industries of the State of Washington (the timber business); that the cost of transporting logs would be reflected in every foot of lumber, and that the public would have such an interest in it that the legislature in the interests of the public should have the power to regulate the price to be charged. Courts have always been quick to uphold the rights of private property, but never at the cost of disregarding the rights of the general public to be protected against the use of private property whenever it [fol. 95] appeared to affect the public interests. Thus in German Alliance Insurance Company v. Kansas, 233 U. S.

389, there was presented to the court the constitutionality of an act of the State of Kansas, which regulated rates to be charged by insurance companies. All of the arguments presented in this case were presented in that, yet the court held that the insurance business was one which was affected with a public interest, and subject to control. The reasons advanced for holding the statute unconstitutional are not materially different from those urged in Munn v. Illinois, supra, Budd v. New York, supra, and Brass v. Stoeser, supra, and they are ably reflected in the dissenting opinions filed in each of those cases. That they are cogent, illuminating and persuasive cannot be denied. But they were not controlling with the majority of the court, and therefore did not establish the law applicable to the facts. There was stressed to the court the newness of the doctrine, and the danger of its extension to the point of wiping out private property. Answering this objection, the court said:

"Against that conservatism of mind, which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired."

In Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, there was presented the question of whether a taxicab company came within the jurisdiction of the Public Utilities Commission of the District of Columbia, and the act creating which provided that it included as common carriers "all express companies, and every corporation controlling or managing any agency for public use for the conveyance of persons or property within the District of Columbia for hire." The court held that the business of the taxicab company was a public utility by ancient usage and understanding, as well as a common carrier within the meaning of the act. In the [fol. 96] case at bar it was urged that a towboat, while engaged in the towing of logs for appellant handled only busi-

ness for one person at a time. The same objection was urged in the case just cited, the court holding that the fact that a taxicab company conveys only one group of customers in a vehicle at a time made it none the less an agency for public character of the service, or takes it out of the definithat it limited its services to guests of a certain hotel. The court said:

"We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. No carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts. But the public generally is free to go to hotels if it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab. We should hesitate to believe that either its contract or its public duty allowed it arbitrarily to refuse to carry a guest upon demand. We certainly may assume that in its own interest it does not attempt to do so. The service affects so considerable fraction of the public that it is public in the same sense in which any other may be called so. German Alliance Insurance Co. v. Kansas, 233 U. S. 389. The public does not mean everybody all the time. See Peck v. Tribune Co., 214 U. S. 185."

Appellant lays some stress upon the decision in Producers Transportation Co. v. Railroad Commission, 251 U. S. 228. In that case the State of California declared that any pipe line used for the transportation of crude oil for the public for hire, and which was constructed and maintained upon any public highway should be deemed a common carrier. The court found that the pipe line had been used in carrying oil for other persons for hire, and that its articles of incorporation allowed it to engage in a public business; and that it had exercised the right of eminent domain. It was said in the court's opinion:

"It is, of course, true that, if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not by mere legislative fiat or by any regu-

lating order of a commission convert it into a public utility or make its owner a public carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment. (Citing many [fol. 97] cases.) On the other hand, if in the beginning or during its subsequent operations the pipe line was devoted by its owner to public use, and if the right thus extended to the public has not been withdrawn, there can be no doubt that the pipe line is a public utility and its owner a common carrier whose rates and practices are subject to regulation. Munn v. Illinois, supra."

Nor do we think any similarity can be established between the case at bar and that of Michigan Utilities Commission v. Duke, 69 L. Ed. Feb. 2, 1925.

In that action the appellant was engaged wholly and solely in the business of hauling automobile bodies from Detroit, Michigan, to Toledo, Ohio, under private contract. He filed no schedule of rates; he hauled for no one except the three manufacturers with whom he had contracts; he did not undertake, nor did he haul for the public generally, nor for such as desired his services. As the court said: "He had no other business and did not hold himself out as a carrier for the public."

Even under these last two decisions relied upon by appellant, the towboat company is a common carrier, for it has filed its schedule of rates for the public, and is devoting its property to a public use generally.

There are four points of similarity between the case at bar and the elevator cases cited: (1) The important character of the article of commerce in which the public has an interest; (2) the number of such articles of commerce affected thereby; (3) the question of whether or not in performing the service private property alone is used; and (4) the question of transportation.

As to the first point, the similarity, it is a matter of common knowledge that the lumber industry of the State of Washington is as important an article of commerce to the people of the State as that of wheat to the states of New York, Illinois or North Dakota.

As to the second, while it appears that wheat was the main article of commerce stored in the elevators, we may assume for the purpose of argument that other grains were stored therein. In the case at bar while the towing of logs [fol. 98] may be the greater share of the business of towboat companies on Puget Sound, yet it is common knowledge that many other manifold services are performed by towboats and the schedule shows that the Shively Towboat Company performs a general towing business.

Upon the third point, in all of the elevator cases the elevator buildings were not only privately owned, but were upon private property, and used no portion of the public highways in the prosecution of their enterprises. In the case at bar the towboats operate wholly and exclusively upon the waters of Puget Sound, a public highway, over which the state has jurisdiction, subject only, of course, to the primary regulation of the Federal Government, itself.

Upon the fourth point, the storage of grain is not necessarily a matter of transportion. While it is true that storage is incident to its transportation in that it provides a resting place for the grain upon its journey, it was not held to be essentially transportation as that word is generaly used and regarded in cases of this character. In the case at bar the business of the towboat company is wholly transportation. Its transportation of logs from one point to another on Puget Sound cannot be essentially different from the transportation of logs upon land by a railroad company from one point to another. The fact that it has no fixed termini is unimportant. While it permits greater latitude in the disposition or handling of its business it cannot change its character. From the earliest times the transportation of property or intelligence has always been understood to be affected with a public interest. If a passenger steamboat carrying passengers for hire, under a regularly filed schedule of rates, and plying between certain ports, is a common carrier; if a freight boat leaving from the same dock and carrying freight for hire to certain ports of call under regularly filed tariffs is a common car- [fol. 99] rier, we see no reason why a towboat, leaving from the same dock, and towing all manner of property for hire, under a regularly filed tariff, to certain ports of call, or

within certain zones, is not also a common carrier under the statute.

The judgment is right and it is therefore affirmed.

Askren, J.

We concur. Holcomb, J., Fullerton, J., Main, J., Mitchell, J., Parker, J.

[fol. 100] In Supreme Court of Washington

19207

Separate Opinion

In the early part of its opinion the court decides that one who tows logs and lumber on the waters of Puget Sound is engaged in the business of a common carrier. If so, it seems to me that the argument should have stopped there, for everyone will admit that the state has a right to fix rates to be charged by a common carrier. But I have seriously doubted the correctness of the conclusion reached by the court. At common law the business of towing lumber and other products was regarded as a private enterprise, and not subject to the strict rules applicable to a common carrier. A common carrier is such only because of the nature of the business done and the services rendered. The legislature may not make one a common carrier by simply declaring him to be such. These towboats have no fixed schedule, do not operate over roads built and maintained by the public, and have no termini. They serve only a very small minority of the public. The nature of their business makes it impossible for them to act for more than one person at a time. They come and go whenever and wherever business calls them. They operate only at the request of one person. They go to the business, and not the business to them. On the other hand, to be fair in our argument, it should be conceded that they are engaged in transportation, and that that business, generally speaking, but not always, constitutes one a common carrier. They also use the public waters. I concede that these are elements from which it can be argued, with some show of reason, that they are common carriers.

But the court asserts that, regardless of what these boats might be in the absence of legislation, the legislature of this state has seen fit to make them common carriers. It is true [fol. 101] that the act includes vessels and defines towboats as vessels, but it undertakes to regulate them only while engaged in the "public service." This, it seems to me, is shown by the act, which defines that a common carrier is, and says that it includes all steamboats operating "for public use." But I shall not seriously quarrel with the court's determination that a tower of logs or lumber is a common carrier. I admit the question is not without doubt. If this were all there was in the opinion, I might, in aid of uniformity, be able to resolve my doubts in favor of the view taken by the majority of the court. But I am more deeply interested in another feature of the opinion, and that is the regulation of private property and business.

After holding that the business of towing is that of a common carrier, the court proceeds to hold, as I read the opinion, that the state may regulate the charges to be made for services by what has heretofore been regarded as a purely private business, provided that business "is affected with a public interest." This, to my mind, is a very important and far-reaching decision. If I remember my history correctly, it is stated that many of our forefathers came to our shores in order that they might have freedom of private contract and be able to transact their private business without interference from the sovereign power, except as that business might be affected by the police power of the state. These ideas were written into the Federal Constitution. Thenceforward this government stood for the rights of the individual as distinguished from paternalism in government, and the courts prided themselves in their effort to uphold those rights. I am afraid, however, that this portion of our governmental structure is beginning to slip from its true foundation.

[fol. 102] If private business is ever to be regulated by the state, then I do not like the rule that it may be regulated when it "is affected with a public interest." It seems to me that the measure is too uncertain, too elastic, and too embracing. Everything the individual does affects, directly or indirectly, the public, and therefore what he does is "affected with a public interest." The people of a given community are more deeply and closely affected by the

charges made by the local grocer for his products, by the clothiers, by the butcher shops, by the saw mills, by every person who produces building materials or handles the necessities of life, than with the charges made by one who tows logs or lumber on Puget Sound. Under this rule of public interest, where are we to stop? The opinion says 'that the cost of transporting logs would be reflected in every foot of lumber" and for that reason the business "is affected with a public interest." Certainly not more so than the charges made by the grocer, for they affect every man, woman and child in the community, and the wage of every laborer must be based thereon. I do not see why the rule laid down by the court would not justify the state in fixing the price of coal, wood, logs, lumber, and all the necessities of life; and thus would the rights of private property and business be wiped out. Again, I ask, where are we to stop under this rule? When may a private business be considered as "affected with a public interest," and when not? It is my inability to answer these questions that leads me to doubt the wisdom of the rule laid down by the court. I am afraid we are leaving the main highway and are taking a side road, which must eventually lead only into someone's private barnyard.

It is my present idea that the only safe rule is that the state may regulate charges and rates only where the busi- [fol. 103] ness sought to be regulated has received from the state some special benefit or privilege that is not possessed by others; as, for example, where the owner of the business has been given the power of eminent domain, a franchise, a license, an exclusive right, the privilege of using the public grounds or public highways, and probably there could also be regulation of those who hold themselves out as common carriers and willing, as such, or otherwise, to serve the public. In these instances the state has given something of value which belonged to the public, and that justifies it in reserving the right to regulate the business for the benefit of the public.

I concede that the rule suggested by me would prohibit charge or rate control by the state of all businesses which are commonly called private; but may we not confidently rely on competition to protect the general public from any serious detriment?

Of course, I am not here taking into consideration the right of the state to regulate private business and property by virtue of its police power, a right which it had before, and has independent of, any constitutional provision. It may be that under this power the state may regulate the prices of a strictly private business which has become, or threatens to become, a monopoly.

Bridges, J.

Concurring with Judge Bridges: Mackintosh, J., Tolman, C. J.

[fols. 104-112] Petition for rehearing, covering eight pages, omitted from this print. It was denied and nothing more by order March 29, 1926.

[fol. 112½] In Supreme Court of Washington

[Title omitted]

Order Denying Petition for Rehearing—Filed March 31, 1926

The court having considered the appellant's petition for a rehearing herein,

It is ordered that the said petition be and it is hereby denied.

Dated this 29th day of March, 1926.

By the Court:

(Signed) Warren W. Tolman, Chief Justice.

[fol. 113] In Supreme Court of Washington

[Title omitted]

Judgment—March 31, 1926

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel,

and the court having fully considered the same, and being fuly advised in the premises, it is now, on this 31st day of March, A. D. 1926, on motion of John H. Dunbar, Esquire, of counsel for respondents, considered, adjudged and decreed, that the Judgment of the said Superior Court be, and the same is hereby affirmed, with costs, the petition for rehearing denied, and that the said Department of Public Works have and recover of and from the said Stimson Timber Co. and from American Surety Co. of New York, surety, the costs of this action, taxed and allowed at seventy-six & 15/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Suprior Court for further proceedings, in accordance herewith.

[fol. 114] [File endorsement omitted]

[Title omitted]

IN SUPREME COURT OF WASHINGTON

PETITION FOR WRIT OF ERROR—Filed April 9, 1926

To the Honorable the Chief Justice of the Supreme Court of the State of Washington:

The Petition of the State of Washington on the relation of Stimson Timber Company, a corporation, the appellant (plaintiff in error) in the above entitled action, respectfully shows:

That your petitioner is the relator and appellant (plaintiff in error) in the above entitled action and final judgment therein was granted and filed in the above entitled court and cause on the 31st day of March, 1926, in and by which judgment the judgment of the Superior Court of the State of Washington for Thurston County affirming the judgment and order of the Department of Public Works of the State of Washington was affirmed. Such final judgment of the Supreme Court of the State of Washington was greatly to the prejudice of your petitioner and such judgment and the proceedings leading thereto are erroneous

in many particulars as will more fully appear from the assignments of errors filed in this cause with this petition. [fol. 115] That in such action it was contended by your petitioner that the act of the legislature of the State of Washington approved March 18, 1911, entitled "An Act relating to public service properties and utilities, providing for the regulation of the same, fixing penalties for the violation thereof, making an appropriation and repealing certain Acts," and the Act of the legislature of the State of Washington approval March 15, 1923, entitled "An Act relating to towboats tugs, scows, barges and lighters, and amending Section 10,344 of Remington's Compiled Statutes," were each in conflict with the Fourteenth Amendment to the Constitution of the United States in that such acts and each of them denied to your petitioner the equal protection of the law and deprived your petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

And in said suit your petitioner also further contended that such acts and each of them as applied to your petitioner and its property and as administered by the respondents (defendants in error) in the above entitled action, deprived petitioner of its property without due process of law and denied it the equal protection of the law, in contravention of said Fourteenth Amendment.

That by said judgment it was adjudged that the price to be charged to your petitioner for the towage of its logs from its logging camp to its mill was subject to the regulation of the Department of Public Works of the State of Washington and that said act of towage was an act of common carriage and was a service affected with a public interest, and that said Department of Public Works had the right to fix the towage charges for said service and that the towage charges so fixed by it were valid and binding upon your petitioner, and that a contract theretofore made by your petitioner with a towboat company for the towage of its said logs from its logging camp to its mill over [fol. 116] and across the waters of Puget Sound in the State of Washington at a rate for towage less than the rate established by said Department of Public Works was void and that the act of said Department of Public Works in this

cause in setting aside said contract and directing said towboat company to collect of your petitioner the difference between the said towage rate fixed in said contract, which had been paid by your petitioner, and the towage rate fixed by said Department of Public Works was a regular and valid order, which said holdings and conclusions were so adjudged as the construction placed by said Supreme Court of the State of Washington upon the acts aforesaid of the legislature of said State; and said Supreme Court also decided that such construction and application of said acts of the legislature of the State of Washington did not deprive your petitioner of its property without due process of law and did not deny it the equal protection of the law as was claimed by your petitioner in said cause. That said holdings had the effect and have the effect, as your petitioner avers, to deprive your petitioner of its property without due process of law and to deny it the equal protection of the law, contrary to the terms and provisions of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained of, your petitioner prays that it may be allowed a Writ of Error in said cause and that said cause be transmitted to the Supreme Court of the United States at Washington, D. C., to determine said errors and that proper orders touching the security required of your petitioner may be made.

(Signed) Reynolds, Ballinger & Hutson, Attorneys for Petitioner and Appellant.

[fol. 117] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

ASSIGNMENTS OF ERROR—Filed April 9, 1926

Comes now the above-named appellant (plaintiff in error), The State of Washington on the Relation of Stimson Timber Company, a corporation, and files herewith its

Petition for a Writ of Error and says that in the records and proceedings in the above entitled suit there are manifest errors and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following Assignments of Errors:

I

The Supreme Court of the State of Washington erred in the above entitled suit in holding that the Act of the Legislature of the State of Washington, approved March 18, 1911, entitled "An Act relating to public service properties and utilities, providing for the regulation of the same, fixing penalties for the violation thereof, making an appropriation and repealing certain Acts," was valid and not in conflict with that provision of the Fourteenth Amendment to the Constitution of the United States prohibiting the State from depriving any person of his property without [fol. 118] due process of law and denying equal protection of the law; and the Supreme Court of the State of Washington erred in such case in not sustaining the claim of appellant (plaintiff in error) that such Act was in conflict with such provisions of the Fourteenth Amendment to the Constitution of the United States because it deprived appellant (plaintiff in error) of its property without due process of law and denied it the equal protection of the law, and was therefore null and void.

II

The Supreme Court of the State of Washington erred in the above entitled suit in holding that the act of the Legislature of the State of Washington, approved March 15, 1923, entitled "An Act relating to towboats, tugs, scows, barges and lighters, and amending Section 10344 of Remington's Compiled Statutes," was valid and not in conflict with that provision of the Fourteenth Amendment to the Constitution of the United States prohibiting the State from depriving any person of his property without due process of law and denying equal protection of the law; and the Supreme Court of the State of Washington erred in such case in not sustaining the claim of appellant (plaintiff in error) that such act was in conflict with such provisions of the

Fourteenth Amendment to the Constitution of the United States because it deprived appellant (plaintiff in error) of its property without due process of law and denied it the equal protection of the law, and was therefore null and void.

III

The Supreme Court of the State of Washington erred in the above entitled suit in holding that Section 8 of said Act of March 18, 1911, as amended by Section 1 of said Act of March 15, 1923, was valid and not in conflict with that provision of the Fourteenth Amendment to the Constitution of the United States prohibiting the State from depriving [fol. 119] any person of his property without due process of law and denying equal protection of the law; and the Supreme Court of the State of Washington erred in such case in not sustaining the claim of appellant that such Act as amended was in conflict with such provisions of the Fourteenth Amendment to the Constitution of the United States because it deprived appellant, plaintiff in error, of its property without due process of law and denied it the equal protection of the law, and was therefore null and void.

IV

The Supreme Court of the State of Washington erred in affirming the judgment of the Superior Court of the State of Washington for Thurston County which affirmed the decision of the Department of Public Works of the State of Washington in this cause, in that, in holding as it did, that the operation of the towing of appellant's (plaintiff's in error) logs from its logging camp to its mill was an act of common carriage and that it was an operation affected with a public interest and subject to regulation as to rates of towage by the Department of Public Works and that the action of the Department of Public Works in so regulating said charges for said towage was lawful and valid, it had the effect to deprive appellant (plaintiff in error) of its property without due process of law and to deprive it of its liberty of contract and of the equal protection of the law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States prohibiting the State from depriving any person of his property without due

process of law and denying the equal protection of the law; and the Supreme Court of the State of Washington erred in not sustaining the claim of appellant (plaintiff in error) [fol. 120] that the regulation of said act of towage and the fixing of charges therefor by said Department of Public Works would deprive appellant (plaintiff in error) of its property without due process of law, and would deprive it of its liberty of contract, and would deny it the equal protection of the law, contrary to the provisions of said Fourteenth Amendment.

V

That the Supreme Court of the State of Washington, having construed said Acts of the Legislature of the State of Washington, approved respectively the 18th day of March, 1911, and the 15th day of March, 1923, as making the act of towing logs on the waters of Puget Sound an act of common carriage though said act were performed for a private owner and by private contract, erred in holding that said acts and each of them as so construed were valid and not in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States prohibiting the State from depriving any person of his property without due process of law and denying the equal protection of the law; and the Supreme Court of the State of Washington in such case erred in not sustaining the claim of appellant (plaintiff in error) that such acts so construed were in conflict with such provision of the Fourteenth Amendment to the Constitution of the United States because it deprived appellant (plaintiff in error) of its property without due process of law and denied it the equal protection of the law, and were therefore null and void.

VI

The Supreme Court of the State of Washington erred in holding that said acts as administered by the State of Washington and by the respondents (defendants in error) in the above entitled suit did not, as applied to appellant [fol. 121] (plaintiff in error), deprive said appellant of its property without due process of law and did not deny it

the equal protection of the law and was not in conflict with the Fourteenth Amendment to the Constitution of the United States as was contended by appellant (plaintiff in error) in such case.

VII

The Supreme Court of the State of Washington erred in not sustaining the contention of the appellant (plaintiff in error) in the above entitled suit that the portion of said Act of March 15, 1923, which defined the term "vessel" as "including towboats, tugs, scows, barges and lighters," thereby bringing within the power of regulation of the Department of Public Works of the State of Washington the charges to be made for the operation of towboats and tugs on the waters of Puget Sound in the State of Washington, was and is void because in conflict with that provision of the Fourteenth Amendment to the constitution of the United States, prohibiting the State from depriving any person of his property without due process of law and denying equal protection of the law, as was contended for by appellant (plaintiff in error) in said cause; and the Supreme Court of the State of Washington in said case erred in holding and deciding contrary to the contention of appellant (plaintiff in error) that said portion of said Act approved March 15, 1923, did not deprive appellant (plaintiff in error) of its property without due process of law and did not deny to appellant (plaintiff in error) the equal protection of the law and was not in violation and contravention of said provisions of said Fourteenth Amendment.

VIII

That the decision in this cause of the Department of Public Works which was affirmed by the Superior Court of the [fol. 122] State of Washington for Thurston County upon review thereof, and upon appeal was affirmed by the Supreme Court of the State of Washington in this cause, in substance and effect declared that that certain oral contract shown in the record to have been made by this appellant (plaintiff in error) with Shively Tow Boat Company for the towing by said Shively Tow Boat Company of logs belonging to appellant (plaintiff in error) from its logging

camp to its mill over the waters of Puget Sound in the State of Washington was invalid and void for the reason that the charge made and to be made by said Shively Tow Boat Company for said services was the sum of Sixteen and one-half Dollars ($16.50) per section of logs towed, whereas the rate fixed for said service by said Department of Public Works was the sum of Twenty-five Dollars ($25.00) per section, and said Shively Tow Boat Company was directed to collect from this appellant (plaintiff in error) the difference between said charge fixed in said contract and said charge fixed by said Department of Public Works, and that in so affirming said order and judgment of said Board of Public Works by so affirming said judgment of said Superior Court of Thurston County, said Supreme Court of the State of Washington did deprive and does deprive appellant (plaintiff in error) of its property without due process of law and of its liberty of contract and of the equal protection of the law, all in derogation of said Fourteenth Amendment to the Constitution of the United States; and said Supreme Court did err in denying the contention of appellant (plaintiff in error) that said contract so made by appellant (plaintiff in error) for the towage of its logs was valid, and that to deny the validity thereof or to require appellant (plaintiff in error) to pay a greater sum for said service than said contract price was forbidden by the provisions of said Fourteenth Amendment to the Constitution [fol. 123] of the United States and would deprive appellant (plaintiff in error) of its property without due process of law, and would deprive it of its liberty of contract, and would deprive it of the equal protection of the law, all in contravention of the provisions of said Fourteenth Amendment.

IX

That the Supreme Court of the State of Washington in this cause erred in holding and deciding that the State of Washington, acting through its Department of Public Works, had power or authority to regulate the charges which appellant (plaintiff in error) should pay for the towage of its logs over the waters of Puget Sound in the State of Washington from its logging camp to its mill, and that appellant (plaintiff in error) could not make a lawful and

valid contract for such towage of its said logs with a towboat company willing to enter upon such contract for a sum less than the charges fixed by said Department of Public Works; which said holding and decision the Supreme Court of the State of Washington, as was contended in said court by appellant (plaintiff in error), did have the effect to deprive appellant (plaintiff in error) of its freedom of contract and of its property without due process of law and did deny to appellant (plaintiff in error) the equal protection of the law, contrary to those provisions of the Fourteenth Amendment to the Constitution of the United States forbidding any State to deprive any person of his property without due process and to deny to any person the equal protection of the law.

X

That the Supreme Court of the State of Washington erred in this cause in holding, contrary to the contention of appellant (plaintiff in error) that the authority exercised [fol. 124] by respondents (defendants in error) under the State of Washington to regulate the rates of towage of appellant's (plaintiff's in error) logs from its logging camp to it mill was not repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States forbidding any state to deprive any person of his property without due process of law and to deny to any person equal protection of the law as was claimed by appellant (plaintiff in error).

XI

That the Supreme Court of the State of Washington erred in rendering judgment affirming the judgment of the Superior Court of the State of Washington for Thurston County and in refusing to render judgment in favor of appellant (plaintiff in error).

Wherefore appellant (plaintiff in error) prays that such judgment of the Supreme Court of the State of Washington in this cause be reversed and that the State of Washington on the Relation of Stimson Timber Company, a corporation, appellant and plaintiff in error herein may be restored to all things which it has lost by occasion of said

final order and judgment, and further may have such other and further relief as may be proper and just.

(Signed) Reynolds, Ballinger & Hutson, Attorneys for Appellant and Plaintiff in Error.

[fol. 125] In Supreme Court of Washington

[Title omitted]

Order Allowing Writ of Error—Filed April 12, 1926

Now on this 10th day of April, 1925, the above named appellant (plaintiff in error), the State of Washington on the relation of Stimson Timber Company, a corporation, relator, having filed its Assignment of Errors in the above entitled cause and after the filing of the same having filed its Petition for the allowance of the Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Washington,

Now, therefore, it is ordered by the undersigned, Chief Justice of the Supreme Court of the State of Washington, that the Writ of Error prayed for by the above named appellant (and plaintiff in error) be and the same is hereby allowed, and that appellant (and plaintiff in error) file a cost bond in the sum of One Thousand Dollars.

Dated this 10th day of April, 1926.

(Signed) Warren W. Tolman, as Chief Justice of Supreme Court of the State of Washington.

[File endorsement omitted.]

[fols.126-128] Bond on writ of error for $1,000, approved and filed April 12, 1926, omitted in printing.

[fol. 129] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

WRIT OF ERROR—Filed April 12, 1926

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Supreme Court of the State of Washington and the Judges thereof, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said Supreme Court of the State of Washington before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the State of Washington on the Relation of Stimson Timber Company, a corporation, relator, plaintiff in error, and E. V. Kuykendall (John C. Denney substituted), as Director of Public Works of the State of Washington; Walter B. Whitcomb (C. Rea Moore substituted); as Supervisor of Public Utilities, and Frank R. Spinning (O. O. Calderhead substituted), as Supervisor of Transportation; and together constituting the Department of Public Works of the State of Washington, defendants in error, where it was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said state, on the ground of their being repugnant [fols. 130 & 131] to the constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the constitution of or a treaty or a statute of, or a commission held under the United States, and the decision was against the title, right, privilege or exemption especially set up or claimed under such clause of the said constitution, treaty, statute or commission, and there being manifest error in said decision, greatly to the damage of the State of Washington upon the Relation of Stimson

Timber Company, a corporation, relator, the plaintiff in error, and we being willing that, if there is error, it should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we do therefore command you, if judgment be therein given, that, under the seal of your court, distinctly and openly, you send the records and proceedings aforesaid had in your court, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington within sixty (60) days from the date hereof, in said Supreme Court, to be then had and held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, on the 10th day of April, in the year of Our Lord One Thousand Nine Hundred Twenty-six.

Ed. M. Lakin, Clerk of the District Court of the United States for the Western District of Washington. (Seal of the United States District Court, Western District of Washington.)

The foregoing Writ of Error allowed this 10th day of April, A. D. 1926.

Warren W. Tolman, Chief Justice of the Supreme Court of the State of Washington.

[fols. 132-134] Citation, in usual form, showing service on John H. Dunbar and H. Brodie, filed April 12, 1926, omitted in printing.

[fol. 135] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted.]

STIPULATION RE TRANSCRIPT OF RECORD—Filed April 19, 1926

For the purpose of shortening the record on Writ of Error in this cause by eliminating therefrom immaterial matters not necessary to the determination of this cause

in the Supreme Court of the United States, the parties hereto do hereby stipulate as follows:

I

That there be included in the Transcript in this cause the following records and no others, to-wit:

a. Petition filed in the Superior Court of Thurston County for Writ of Review.

b. Order for Writ of Review.

c. Writ of Review.

d. Return to Writ of Review, omitting that part of the evidence returned therewith hereinafter designated but including therein the Findings of Fact and Order of the Department of Public Works and all other portions thereof except as hereinafter stated.

e. Judgment of said Superior Court.

f. Notice of Appeal to the Supreme Court of the State of Washington.

g. Bond on Appeal.

[fol. 136] h. Opinions of the Supreme Court, both of the majority of the Court and of the Judges dissenting therefrom.

i. Petition for Rehearing.

j. Order denying Petition.

k. Final judgment of said Supreme Court of the State of Washington.

l. Petition for Writ of Error.

m. Assignments of Error.

n. Order allowing Writ of Error.

o. Bond.

p. Writ of Error.

q. Citation and Proof of Service.

r. This Stipulation.

s. Acknowledgments of Service.

II

That said Transcript be duly certified by the Clerk of the Supreme Court of the State of Washington and that the original Writ of Error and the original Citation and Proof of Service be transmitted as a part of said record.

III

That in copying the return of the Department of Public Works to the Writ of Review the Clerk of the Court proceed as follows:

a. That the objections and discussions of counsel shown therein and the colloquy between counsel and the rulings and observations of members of the Board hearing said matter be omitted, the same being immaterial to any question to be presented on the hearing of this cause in the Supreme Court of the United States.

b. That the direct examination of Otis L. Shively be shown, and his cross-examination appearing on pages 10 and 11, and the first five questions and answers on page 12 of the Transcript of Testimony, be set forth; also that there be set forth the last question and answer on page 16 of said testimony and the first question and answer on page 17, and the question commencing on the last line of page 17, [fol. 137] and all of page 18 of said record of the testimony; and also all questions and answers following the words "The Director," on page 19 and down to and including the answer "Between ninety and one hundred miles." on page 20 of said record of testimony; also the last six question- with their answers on page 24 and the first five questions with their answers on page 25, and the last three questions on page 29 and the first four questions on page 30 with their answers; and also commencing with the second question on page 31 of said record down to and including the last answer preceeding the re-direct examination on page 31; also including the fifth, sixth, seventh and eighth questions with their answers on page 33.

c. That the direct and cross examination of W. T. Isted be included, excluding comments and arguments of counsel.

d. That the testimony of C. W. Stimson be included.

e. That all the testimony of Mr. Isted, re-called, commencing on page 45 of said record and ending on page 49, be included, and the objections and colloquy and arguments of counsel be excluded.

f. That the testimony of Otis L. Shively commencing on page 49 of said record down to and including the second

answer on page 50 of said record be included, and that the balance thereof be excluded as being immaterial.

g. That the examination of Mr. T. H. Jennings appearing on pages 52 and 53 of the record, excluding colloquy and remarks of counsel, and the further evidence of said witness on page 56 of the record commencing with the last question and answer on said page and all testimony of said witness on page 57 of said record and down to and including the first answer on page 58 of said record, be included; and all the testimony of said witness on page 60, excluding the first three questions and answers on said page and all the testimony of said witness on pages 61 and 62 and the first answer and the first four questions with their answers on page 63 of said record be included; and that the last two questions and their answers on page 64, and all the ques-[fol. 138] tions and answers on page 65 and the questions and answers, excluding the objections interposed, on page 66 and all of page 67 and down to and including the first answer on page 68 of said record, be included; and that all the questions and answers on page 69 to the end of the witness's testimony on page 70 be included.

h. That the testimony of H. O. Berger commencing on page 70 and ending on page 78 of the record be included, but excluding the colloquy of counsel.

i. That the testimony of Lindley Davis commencing on page 78 down to the next to the last question on page 79 be included, and the remaining testimony of said witness be excluded as being immaterial.

j. That the first six questions and answers in the testimony of A. L. McNealy on page 85 of said record and the last question and answer contained in his testimony on page 88 of said record, and all of pages 89, 90, 91 and 92 of said record be included.

k. That the testimony of Witness Harry Ramwell on page 93 of said record and the last two questions on page 96 and all of the questions propounded to said witness on page 97, with their respective answers, be included.

l. That all of the testimony of Charles C. Croft appearing on page 97 of said record and the first question and answer on page 98 of said record, and all the questions and answers commencing with the seventh question on page 98 of said

record, and all of page 99, be included, and that the balance of the testimony of said witness be omitted as immaterial.

m. That of the testimony of Martin Hefner the following be included: All of said testimony appearing on page 106 and page 107 down to and including the answer to the seventh question on page 107 of said record; and all testimony on page 108 of said record; and the balance of said testimony of said witness be omitted as immaterial.

n. That there be included all the testimony of G. S. At- [fol. 139] wood appearing on pages 109 and 110 of said record and all of said testimony on page 111 down to and including the fourth question on cross-examination with the answer thereto.

o. It is agreed between the parties hereto that all testimony omitted by authority of this stipulation is immaterial to any question to be presented on writ of error in the Supreme Court of the United States.

p. It is further hereby agreed that the orders of the Department of Public Works of the State of Washington, shown in Exhibits No. Two, Three, and Four, are fair on their face if in point of law said Department of Public Works had and has power to fix rates for the towage of logs, and that they shall be omitted from the Transcript as not being material to any question to be presented in this cause to the Supreme Court of the United States.

q. It is further agreed that Department's Exhibit No. One is the tariff No. Four filed by the Northwestern Towboat Owners Association in accordance with Order No. 5544 of the Department of Public Works of the State of Washington, which tariff No. Four became effective September 30, 1923. That said exhibit consists first of maps, showing together all of the waters of Puget Sound and adjacent waters divided into zones, each bearing an individual number. In the supplementary notes thereto it is said: "This tariff names rates on towing service between all points on Puget Sound and adjacent waters. The maps which are attached to and are a part of this tariff show the zones into which the entire territory is divided and all points within any one zone will take the rate for that zone." It then contains two printed pages showing the method of application of the rates. This is followed by a list of the

towboat operators, fifty in number, concurring in the tariff, which includes the name of Shively Tow Boat Company. This is then followed by the rates to be charged for towing ships and scows and logs between zones, and rates for other services which may be rendered by tugs, covering approxi- [fol. 140] mately seventeen pages of printed tabulations, which in turn is followed by several pages of base rates for towage between certain points. On the page devoted to the towage of fir logs appears the following: "Towing logs from Clifton to Lake Union: $25.00 per section; minimum 16 section; each section not to exceed 6,000 square feet."

At the top of said explanatory notes are the words: "All tows at owner's risk," and a further note is attached reading as follows: "NOTE.—This tariff is intended to name specific rates for all services on Puget Sound and adjacent waters. It is improper to apply any rate other than that which is named or authorized by this tariff. In case any operator is offered a movement for which there is no specific tariff charge, the operator should call this to the attention of the Northwestern Towboat Owners Association by addressing the secretary, Mr. W. T. Isted, 270 Collins Bldg., Seattle, Washington."

It is agreed that this summary of said Exhibit is a fair statement of all facts shown in said Exhibit material to the hearing of this cause in the Supreme Court of the United States, which summary shall be used in place of said Exhibit, and that said Exhibit shall not be included in said Transcript.

IV

It is further hereby stipulated and agreed that the record designated in this Stipulation be printed by the Clerk of the Supreme Court of the United States.

Dated this 16th day of April, 1926.

Reynolds, Ballinger & Hutson, Attorneys for Plaintiff in Error. John H. Dunbar, Attorney General, State of Wash.; H. C. Brodie, Asst. Attorney General, State of Wash., Attorneys for Defendants in Error.

[fol. 141] In Supreme Court of Washington

[Title omitted.]

Order Substituting Parties Respondent

Upon the presentation of the stipulation of the parties hereto, it appearing to the Court that since the commencement of this action respondent E. V. Kuykendall has ceased to be Director of Public Works of the State of Washington and has been succeeded in that office by John C. Denney and respondent Walter B. Whitcomb has ceased to be Supervisor of Public Utilities of said state and has been succeeded in that office by C. Rea Moore, and that respondent Frank R. Spinning has ceased to be a Supervisor of Transportation of said State and has been succeeded in that office by O. O. Calderhead,

It is hereby ordered by that Court that said John C. Denney be substituted for E. V. Kuykendall as respondent herein; that C. Rea Moore be substituted for Walter B. Whitcomb as respondent herein, and that O. C. Calderhead be substituted for Frank R. Spinning as respondent herein, and that the title of this cause hereafter used in all proceedings hereinafter occurring shall be changed to designate the respondents as follows:

"E. V. Kuykendall (John C. Denney substituted), as Director of Public Works of the State of Washington; Wal-[fol. 142] ter B. Whitcomb (C. Rea Moore substituted), as Supervisor of Public Utilities, and Frank R. Spinning (O. O. Calderhead substituted), as Supervisor of Transportation, and together constituting the Department of Public Works of said State."

Dated this 19th day of March, 1926.

Warren W. Tolman, Chief Justice.

[fol. 143] Proof of service of writ of error papers omitted in printing.

[fol. 144] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 145] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT THE ENTIRE RECORD—Filed May 26, 1926

I

The towage of logs of Plaintiff in Error from its logging camp on Hood Canal to its mill on Lake Union at Seattle, Washington, for the purpose of manufacture into lumber by said Plaintiff in Error, is not an act of common carriage.

II

The Tug Boat Company towing the logs of plaintiff in error from its logging camp on Hood Canal in the State of Washington to the mill of the plaintiff in error is not in said operation a common carrier.

III

That the towage of the logs of Plaintiff in Error from its logging camp on Hood Canal in the State of Washington to its mill at Lake Union in Seattle, Washington, said logs to be there manufactured by Plaintiff in Error into lumber, is not affected with a public interest.

IV

That said operation of the towing of the logs of Plaintiff in Error from its logging camp to its mill where said [fol. 146] logs are to be manufactured into lumber, not being an act of common carriage, nor an act affected with a public interest, is not subject to regulation by the State of Washington, nor has said State jurisdiction to fix the rate which Plaintiff in Error shall pay for such transportation of its logs.

V

That said operation of towage of the logs of Plaintiff in Error from its logging camp on Hood Canal to its mill on Lake Union, not being an act of common carriage, nor being affected with a public interest, Plaintiff in Error has the right to enter upon a private contract with the Towing Company for the towage of said logs as aforesaid at a price for said service agreeable to the Plaintiff in Error and to said Towage company.

VI

That the Act of the Legislature of the State of Washington approved March 18th, 1911 being Chapter 117 of the Session Laws of said State as amended by the Act of the Legislature of said State approved March 15th, 1923 being Chapter 116 of the Session Laws of said State, as construed by the Supreme Court of the State of Washington in this cause, are void because in conflict with the Fourteenth Amendment of the Constitution of the United States, in that such acts and each of them as so construed deny the Plaintiff in Error the equal protection of the law and deprive the Plaintiff in Error of its property without due process of law and deny the Plaintiff in Error its liberty of contract. That the judgment of the Supreme Court of the State of Washington in this cause, by affirming the judgment of the Superior Court of Thurston County, Washington which upheld the order and decision of the Department of Public Works, has the effect to destroy the agreement and contract [fol. 147] made by Plaintiff in Error with Shively Tow Boat Co. for the towage of its logs at price mutually satisfactory to Plaintiff in Error and said Shively Tow Boat Co. and requires Plaintiff in Error to pay a materially larger sum for said service than that fixed in the said agreement, to-wit: more than $6,500.00 more per year, and thereby deprives the Plaintiff in Error of its property without due process of law and denies Plaintiff in Error the equal protection of the law contrary to and in derogation of the Fourteenth Amendment to the Constitution of the United States.

VII

That the concurrence of said Shively Tow Boat Co. in the towage rate filed with the Department of Public Works by the Puget Sound Tug Boat Association does not devote the property of said Shively Tow Boat Co. to the Public Service nor make said Shively Tow Boat Co. a common carrier with respect of the towage of the logs of Plaintiff in Error from its logging camp on Hood Canal in the State of Washington to its mill at Lake Union in Seattle, Washington.

VIII

That, if by reason of said concurrence in said rate by said Shively Tow Boat Co. said Company may not complain of the regulation of its rates by the Department of Public Works of the State of Washington, said concurrence by said Shively Tow Boat Co. could not and did not have the effect to deprive Plaintiff in Error of its right to secure the performance of said towage at a rate to be fixed by private contract, and if by said act of the Legislature of the State of Washington as so construed by the Supreme Court of said State the concurrence in said tariff which said Shively Tow Boat Co. would have the effect to invalidate [fols. 148 & 149] the agreement between Plaintiff in Error and said Shively Tow Boat Co. fixing the price to be paid by Plaintiff in Error for said service, said act is void as being in derogation of the Fourteenth Amendment of the Constitution of the United States in that, by the act of the Shively Tow Boat Co. in which the Plaintiff in Error did not participate. The Plaintiff in Error is deprived of its right of private contract and of its property without due process of law, and is denied the equal protection of the law.

For the consideration of the foregoing points Plaintiff in Error thinks that the entire record in this cause is necessary and it, therefore, designates to be printed the entire record.

C. A. Reynolds, Reynolds, Ballinger & Hutson, Attorneys for Plaintiff in Error.

We hereby acknowledge due service of the foregoing statement of points and designation of the parts of the record to be printed this 20th day of May, 1926.

John H. Dunbar, H. C. Brodie, Attorneys for Defendants in Error.

[fol. 150 & 151] STIPULATION

It is hereby stipulated and agreed by and between the parties hereto that the entire record sent to the Supreme Court of the United States by the clerk of the Supreme Court of the State of Washington in the above entitled cause, be printed by and under the direction of the Clerk of the United States Supreme Court.

Dated this 20th day of May 1926.

C. A. Reynolds, Reynolds, Ballinger & Hutson, Attorneys for Plaintiff in Error. John H. Dunbar, H. C. Brodie, Attorneys for Defendant in Error.

[fol. 152] [File endorsement omitted.]

Endorsed on cover: File No. 31,939. Washington Supreme Court. Term No. 378. The State of Washington on the relation of Stimson Timber Company, plaintiff in error, vs. E. V. Knykendall (John C. Denney, substituted), as Director of Public Works of the State of Washington, et al. Filed May 17th, 1926. File No. 31,939.

FILED
MAY 4, 1927
WM. R. STANSBURY
Clerk

IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 66

OCTOBER TERM, 1926.

THE STATE OF WASHINGTON *on the relation of Stimson Timber Company, Plaintiff in Error,*

v.

E. V. KUYKENDALL (*John C. Denney, Substituted*), *as Director of Public Works of the State of Washington, et al., Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

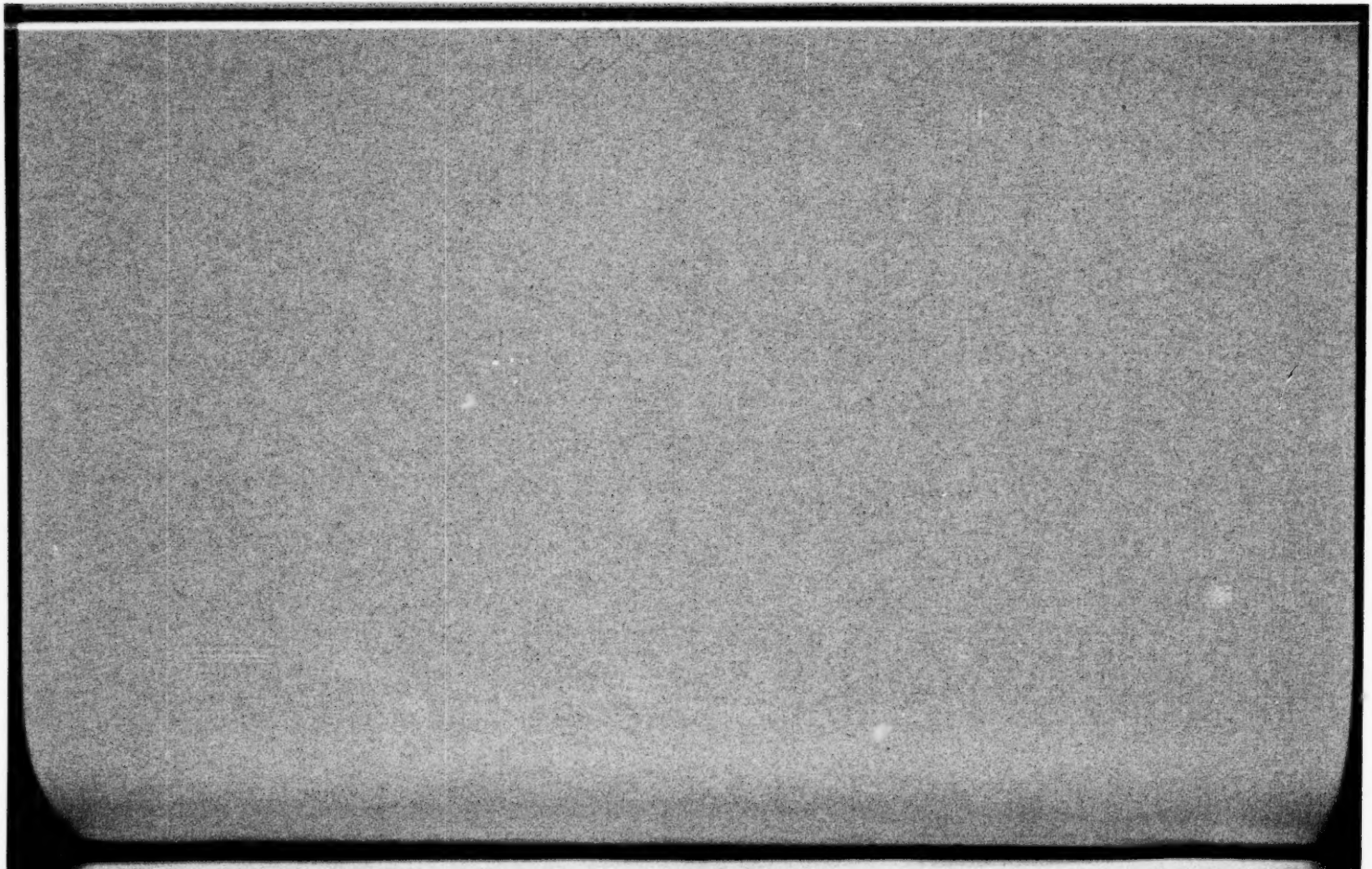
Brief of Defendants in Error

JOHN H. DUNBAR,
Attorney General of the State of Washington,

H. O. BROWN,
Assistant Attorney General of the State of Washington,

Attorneys for Defendants in Error.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.



IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 378

OCTOBER TERM, 1926.

THE STATE OF WASHINGTON *on the relation of Stimson Timber Company, Plaintiff in Error,*

v.

E. V. KUYKENDALL (*John C. Denney, Substituted*), *as Director of Public Works of the State of Washington, et al., Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Brief of Defendants in Error

JOHN H. DUNBAR,
Attorney General of the State of Washington,

H. C. BRODIE,
Assistant Attorney General of the State of Washington,

Attorneys for Defendants in Error.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

INDEX.

Page

Statement 11

Argument:

I. Towage business on Puget Sound is affected with a public interest..... 21

II. The Shively Towboat Co. is a common carrier under the laws of the state of Washington.... 40

III. The Shively Towboat Co., being a common carrier and having filed a tariff naming rates for all towing services on Puget Sound, cannot make a private contract for towage at rates less than its published tariff..... 50

IV. Plaintiff in error not in position to challenge the constitutionality of the state statute..... 54

V. Answer to the contentions of plaintiff in error. 58

Answer to contention that:

A. Private towage is not optional under the statute 58

B. Acquiescence by the Shively Towboat Co. in rate fixing is not binding on the owner of the tow..... 61

C. A towboat is not a common carrier..... 61

D. The towage of logs on Puget Sound is not affected with a public interest..... 63

E. Towage of logs on Puget Sound is not common carriage 68

F. Private carriage cannot be made common carriage by legislative fiat..... 72

G. The decision of this case is not controlled by Munn v. Illinois (94 U. S. 113)..... 74

Page

H. A monopoly does not exist and from natural causes cannot exist in the business of towage of logs on Puget Sound.. 74

I. The statute tends to create a monopoly rather than to prevent monopoly..... 75

J. The right of private contract for towage of logs is denied when the rate is prescribed by the state..... 76

K. All transportation is not common carriage 76

CASES CITED.

Page

American Mills Co. v. American Surety Co., 260 U. S. 360; 67 L. Ed. 306 57

Antoni v. Greenhow, 17 Otto 769, 775; 27 L. Ed. 468, 471 22

Atchison T. & S. F. R. Co. v. Robinson, 233 U. S. 172; 58 L. Ed. 901 53

Atkin v. Kansas, 191 U. S. 207, 222; 48 L. Ed. 148, 158 ..... 22, 23

Austin v. Tennessee, 179 U. S. 343, 361, 363; 45 L. Ed. 224, 233, 234 22

Austin Brothers Transfer Co. v. Bloom, 147 N. E. 387 54

Bacon v. Walker, 204 U. S. 311, 317; 51 L. Ed. 499, 502 22

Barrett v. Indiana, 229 U. S. 26; 57 L. Ed. 1050 22

Block v. Hirsh, 256 U. S. 135, 155; 65 L. Ed. 865, 870 .. 29

Boston & M. R. Co. v. Hooker, 233 U. S. 97; 58 L. Ed. 868 53

Brass v. North Dakota, 153 U. S. 391, 403; 38 L. Ed. 757, 761 ..... 26, 28, 34, 38

Budd v. New York, 143 U. S. 517; 36 L. Ed. 247 ..... 25, 34

Bussey v. Mississippi Valley Transportation Co., 13 Am. Rep. 120 62

Carlson v. Cooney, 123 Wash. 441; 212 Pac. 575 73

Cary-Davis Towing Co. v. Spradley, 115 Wash. 93, 98; 196 Pac. 655 62

Chicago & A. R. Co. v. Kirby, 225 U. S. 155; 56 L. Ed. 1033 53

Chicago & E. I. Ry. Co. v. Chicago Heights Terminal T. R. Co., 147 N. E. 667 54

Clapp v. Stanton, 96 Am. Dec. 417 62

C. M. & P. S. R. Co. v. Public Service Com., 77 Wash. 529; 137 Pac. 1057 71

Page

12 Corpus Juris 769 57

15 Corpus Juris 845 57

Cotting v. Godard, 183 U. S. 79, 85; 46 L. Ed. 92, 99.. 29

Cushing v. White, 101 Wash. 172; 172 Pac. 229; L. R. A. 1918F 463 69

Davis & Banker v. Metcalf, 131 Wash. 141; 229 Pac. 2 73

Dayton Coal & Iron Co. v. Cincinnati N. O. & T. P. R. Co., 239 U. S. 446, 451; 60 L. Ed. 375, 379..... 52

Electric Co. v. Dow, 166 U. S. 489, 490; 41 L. Ed. 1088, 1089 48

Ficklen v. The Taxing District of Shelby County, 145 U. S. 1, 24; 36 L. Ed. 601, 607..... 48

Frost v. Railroad Commission, 271 U. S. 583, 591.... 72

German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 407, 410, 414; 58 L. Ed. 1011, 1020, 1021, 1022 .....27, 28

Goldsworthy v. Maloy, 119 Atl. 693..... 54

Grand Rapids & Indiana Ry. Co. v. Osborne, 193 U. S. 17, 29; 48 L. Ed. 598, 604..... 48

Great Falls Manufacturing Co. v. Garland, 124 U. S. 581, 600; 31 L. Ed. 527, 533..... 48

Healy Lumber Co. v. Morris, 33 Wash. 490..... 66

Hurley v. Commission of Fisheries of Virginia, 257 U. S. 223; 66 L. Ed. 206..... 57

Kansas City Southern Railway Co. v. Carl, 227 U. S. 639; 57 L. Ed. 683..... 52

Keogh v. Chicago & N. W. R. Co., 260 U. S. 156, 163; 67 L. Ed. 183, 187..... 52

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78; 55 L. Ed. 369, 377..... 22

Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 97; 59 L. Ed. 853, 855..... 51

Page

McLean v. Arkansas, 211 U. S. 539, 548, 551; 53 L. Ed. 315, 320, 321 ..... 22, 23

Merchants' Heat & Light Co. v. Clow & Sons, 204 U. S. 286; 51 L. Ed. 488 57

Michigan Public Utilities Com. v. Duke, 266 U. S. 570 72

M. K. & T. Ry. Co. v. May, 194 U. S. 267, 269; 48 L. Ed. 971, 972 22

Munn v. Illinois, 94 U. S. 113, 132; 24 L. Ed. 77, 86 ..... 21, 22, 24, 26, 34, 74

Nearhoff v. Dept. of Public Works, 134 Wash. 677; 236 Pac. 288 68

Oregon-Washington R. & N. Co. v. Seattle Grain Co., 106 Wash. 1, 5; 178 Pac. 648 53

Otis & Gassman v. Parker, 187 U. S. 606, 609; 47 L. Ed. 323, 327 ..... 22, 23

Ozan Lumber Co. v. Union County Bank, 207 U. S. 251, 255, 257; 52 L. Ed. 195, 196, 197 22

Pierce v. Somerset Ry., 171 U. S. 641, 648; 43 L. Ed. 316, 319 48

Pierce Oil Corporation v. Phoenix Refining Co., 259 U. S. 125; 66 L. Ed. 56, 57 47

Producers Transportation Co. v. Railroad Commission, 251 U. S. 228; 64 L. Ed. 239 ..... 54, 73

Red Ball Transit Co. v. Marshall, 8 Fed. (2nd) 635 .. 54

Restivo v. West, 129 Atl. 884 54

24 Ruling Case Law 1296 67

28 Ruling Case Law 29, 41 67

Shepard v. Barron, 194 U. S. 553, 567; 48 L. Ed. 1115, 1120 48

Smith v. Pierce, 1 La. 350, 355 62

Page

Smitherman & McDonald v. Mansfield Hardwood Lbr. Co., 6 Fed. (2nd) 29 54

Southern R. Co. v. Prescott, 240 U. S. 632, 638; 60 L. Ed. 836, 839 53

Southwestern Oil Co. v. Texas, 217 U. S. 114, 126; 54 L. Ed. 688, 694 ..... 22, 24

Sproul v. Hemingway, 14 Pick. 1 62

State ex rel. C. M. & P. S. R. Co. v. Public Service Comm., 77 Wash. 529; 137 Pac. 1057 71

State ex rel. N. P. Ry. Co. v. Public Service Commission, 95 Wash. 376; 163 Pac. 1143 71

State ex rel. Stimson Timber Co. v. Kuykendall, 137 Wash. 602, 606 47

State v. Washington Tug & Barge Co., 140 Wash. 613, 614; 250 Pac. 49 ..... 41, 42, 50, 59

State Public Utilities Commission v. Monarch Refrigerating Co., 108 N. E. 716 54

Tanner v. Little, 240 U. S. 369; 60 L. Ed. 691 22

Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 255; 60 L. Ed. 984, 986 ..... 28, 69

Texas & Pacific Ry. Co. v. Easton, 214 U. S. 153; 53 L. Ed. 946 57

Tyson & Bro.—United Theatre Ticket Offices v. Banton, 46 Sup. Ct. Adv. Sheets 426, 428, 431; 71 L. Ed. Adv. Sheets 493, 495, 497 ..... 63, 65

Wall v. Parrott Silver & Copper Mining Co., 244 U. S. 407, 411; 61 L. Ed. 1229, 1231 ..... 47, 48

Watson v. Maryland, 218 U. S. 174, 179; 54 L. Ed. 987, 990 22

Welch v. Swazey, 214 U. S. 91, 107; 53 L. Ed. 923, 930 22

Page

White v. The Mary Ann, 6 Cal. 462; 65 Am. Dec. 523 62

Wilson v. New, 243 U. S. 332; 61 L. Ed. 755..... 29

Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 535, 538, 539; 67 L. Ed. 1103, 1108, 1109, 1110 .....29, 39

Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552; 69 L. Ed. 785.....39, 40

STATUTES CITED.

Page

U. S. Statutes,
Sec. 6, Interstate Commerce Act (41 Stat. 483).. 51

State of Washington,
Chapter 117, Laws of 1911.....11, 65
Section 8 12
Section 9 46
Section 14 46
Section 16 46
Section 18 50
Section 20 50
Section 53 65
Chapter 111, Laws of 1921..... 72
Chapter 116, Laws of 1923..... 12
Remington's Compiled Statutes of Washington, 1922:
Section 10344 12
Section 10345 46
Section 10350 46
Section 10352 46
Section 10354 .....50, 51
Section 10356 50
Section 10389 65

196

51

65
12
46
46
46
50
50
65
72
12

12
46
46
46
51
50
65

IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 378

OCTOBER TERM, 1926.

THE STATE OF WASHINGTON *on the relation of Stimson Timber Company, Plaintiff in Error,*
v.
E. V. KUYKENDALL (*John C. Denney, Substituted*), *as Director of Public Works of the State of Washington, et al., Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Brief of Defendants in Error

STATEMENT OF THE CASE.

We deem it advisable to make a more complete statement of the facts than has been made in the opening brief of plaintiff in error.

The public service commission law of the state of Washington was passed in 1911, being chapter 117,

Laws of 1911, page 538. Section 8 of that act, being section 10344, Remington's Compiled Statutes of Washington, 1922, contained definitions of the various public utilities to which the act applied. Definitions of "vessel," "steamboat company" and "common carrier" were such that they would naturally be considered as applying to towboats. The act was so construed by the towboat operators generally who were required to be more specific in their rates after the public service commission of Washington came into existence (Rec. 59). The Northwestern Towboat Owners Association was formed in 1919 (Rec. 29). It has generally represented the towboat industry in the filing of tariffs covering rates for towage on Puget Sound, and its first tariff was filed with the public service commission in August, 1919 (Rec. 43).

Apparently, however, some doubt existed as to the sufficiency of the statutory definitions in the 1911 act, and the act was clarified by the legislature which reenacted section 8 of the 1911 law in 1923, amending therein the definition of "vessel" (ch. 116, Laws 1923, pp. 314, 318) to read as follows:

> "The term 'vessel,' when used in this act, includes every species of water craft, by whatsoever power operated, for the public use in the conveyance of persons or property for hire over and upon the waters within this state, including tow boats, tugs, scows, barges and lighters (excepting row boats and sailing boats under twenty gross tons burden, open steam launches of five tons gross and under, and vessels under five tons gross propelled, by gas, fluid, naptha or electric motors)."

No change was made in the 1923 law in the definitions of "steamboat company" and "common corrier," which have been defined at all times since 1911 as follows:

"The term 'steamboat company,' when used in this act, includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, controlling, leasing, operating or managing any vessel over and upon the waters of this state."

"The term 'common carrier,' when used in this act, includes all railroads, railroad companies, street railroads, street railroad companies, steamboat companies, express companies, car companies, sleeping car companies, freight companies, freight line companies, and every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, owning, operating, managing or controlling any such agency for public use in the conveyance of persons or property for hire within this state."

On May 1, 1923, shortly after the passage of the 1923 act, the department of public works, the successor of the public service commission, and erroneously designated throughout the brief of plaintiff as the "board" of public works, held a hearing to consider rates for towage on Puget Sound, as a result of which hearing the Northwestern Towboat Owners Association was required to file a new tariff (Rec. 44). This tariff was a complete and elaborate compilation under which the entire area of Puget Sound was divided into zones and rates named within each zone, and between

each zone and every other zone. The tariff stated that it "names rates on towing service between all points on Puget Sound and adjacent waters." This tariff named a rate of 94 cents per thousand feet from Clifton to Lake Union, the points involved in this case (Rec. 44, 45). A supplement to this tariff became effective on May 21, 1924, providing an additional rate of $25 per section from Clifton to Lake Union (Rec. 44). These tariffs were filed by the Northwestern Towboat Owners Association and were concurred in by all towboat operators on the Sound, including the Shively Towboat Company (Rec. 10, 43).

The Stimson Timber Company operates a logging camp about six or seven miles from Clifton on Hood Canal and a lumber mill on Lake Union in Seattle (Rec. 33). At the time Stimson commenced operations there he went to the Northwestern Towboat Owners Association and asked them to give him a towage rate from his camp the same as then applied from Union City and Potlatch on Hood Canal so that he would be in as good a position as his competitors, the rate from Clifton being at that time 10 cents higher per thousand feet than from the other points. His request was complied with (Rec. 60). The exact time at which Stimson commenced his operations on Hood Canal is not shown, but at first he sold his logs in the open market, the purchaser paying the towage, and the rate per thousand feet apparently applied (Rec. 37). He has been having his logs towed in sections

since about May, 1921 (Rec. 37). "A section is the amount of logs you can surround by four long boom sticks" and would ordinarily embrace from 50,000 to 70,000 feet (Rec. 26).

The record does not disclose who towed these logs for Stimson until C. C. Croft undertook it. Croft filed a tariff with the department of public works applicable to this Stimson towing effective November 16, 1921, naming a rate of $15 a section. Effective April 2, 1923, Croft filed a supplemental tariff naming a rate of $16.50 a section. On December 12, 1923, Croft filed a cancelation of his tariff (Rec. 44). Stimson was familiar with the fact that Croft was operating under tariff, as he advised O. O. Calderhead, then rate and traffic expert of the department of public works, that he had no objection to Croft filing the $16.50 tariff (Rec. 36). Apparently after Croft ceased towing for Stimson other people towed at the $16.50 rate, though the record does not show any other tariffs having been filed.

Shively began towing for Stimson on March 1, 1924 (Rec. 23). He had been engaged in towing for fifteen years, and the Shively Towboat Company was organized in 1918 (Rec. 25). He had no written contract with Stimson, but merely a verbal agreement that he would do the towing at $16.50 and see how he came out (Rec. 22, 28). At the time Shively commenced towing for Stimson, he had filed a concurrence in the tariff of the Northwestern Towboat Owners Association, which named the rate of 94c per

thousand feet for towage of logs between zones 53 and 106 in which Clifton and Lake Union are located (Rec. 44). Shively, however, did not withdraw his concurrence in this tariff, nor did he file any separate tariff naming the $16.50 rate. The $25 per section rate was put into effect while Shively was still towing for Stimson on May 21, 1924 (Rec. 44).

The Shively Towboat Company was not engaged exclusively in towing logs for the Stimson Timber Company. These Stimson logs were towed by Shively's boat the "Katherine M". This boat, in addition to the Stimson towing, did $500 worth of other towing in March, $300 in April, $1000 in May, and $2000 in June (Rec. 24). In addition to the "Katherine M", Shively had another towboat, the "Interlaaken" and one scow. Just prior to the hearing before the department he had purchased five other scows and another boat, but they were not then in operation (Rec. 25).

There are other logging operations in the vicinity of Clifton on Hood Canal. Stimson testified as to one operation above him at Clifton (Rec. 35). Shively, during the time he was towing for Stimson, also towed logs from the same territory for the Bolcom Lumber Company (Rec. 25). He also towed from Potlatch, about twelve miles from Clifton, where the haul is practically the same as the Stimson haul (Rec. 29). Atwood, only a short time before the hearing, took a tow from a camp about a mile above Stimson's camp to Everett (Rec. 70).

On June 6, 1924, the Stimson Timber Company, through its attorneys, filed objections to the $25 per section rate with the department of public works and demanded "a hearing upon said rate" (Rec. 7). A hearing was had on July 22, 1924, and the department's order holding the $25 per section rate reasonable and requiring the Shively Towboat Company to collect the difference between its tariff rate and the $16.50 rate was made on October 17, 1924. This order was reviewed in the statutory manner in the superior court for Thurston County, where the order was affirmed, and an appeal taken from the superior court to the supreme court of the state which again affirmed the order of the department.

One of the main subjects of controversy throughout the litigation in the state courts and before the department of public works was the reasonableness of the rate, the Stimson Timber Company alleging that the $16.50 rate was reasonable and sufficient and the $25 rate excessive. Upon writ of error to this court the question of the reasonableness of the rates is not involved, the parties having stipulated that the several orders of the department of public works fixing rates for towage are fair on their face if the department, as a matter of law, had the right to make any rates for such service (Rec. 102).

We do not feel that plaintiff in error has correctly stated the questions to be determined by this court in this proceeding. On page 2, plaintiff in error states the question as follows:

"The case involves the right of the State of Washington to compel all tow boats operating in the State of Washington to assume the status of common carriers; the right of an owner of logs who may desire to have them towed through the free waters of Puget Sound to obtain such service by private contract; and the right of the state to fix the rate of towage."

and again on page 6, states the question as follows:

"The plaintiff in error thereupon was allowed a writ of error by the Chief Justice of that Court (Rec. page 96), and the case comes here for review as to the right of the State of Washington to declare by statute the towage of logs through the waters of Puget Sound by private individuals for private use to be 'common carriage' and the further right of a private citizen to privately contract for the towage of his logs from one situation on Puget Sound owned by him to another point of destination also owned by the same person and for his own purpose and the right of the state to determine the price of towage to be charged therefor."

There is no contention by the department of public works, nor did the state supreme court hold that the Stimson Timber Company was not free to make private contracts for the towage of its logs. The state statute does not prohibit such an arrangement. That question was not before the department or the state courts. The foregoing statement of the facts shows that a towboat company had filed a tariff with the department naming rates for all towage service on the Sound, and, notwithstanding such tariff and notwithstanding that the towboat company continued to engage generally in towage business, it attempted to name a preferential rate to the Stimson Timber Company much lower than its published tariff rate.

There is no contention that the Stimson Timber Company could not have towed its logs with its own towboat without interference on the part of the state, nor that the Stimson Timber Company is not free to engage the exclusive use of a towboat which is not engaged in public service.

It seems to us that this court is required to determine three questions in this case which may be fairly stated as follows:

(1) Is the business of towage for the public generally on the waters of Puget Sound under the conditions existing in the state of Washington so affected with a public interest that the state of Washington may regulate the rates, services and facilities devoted to such business?

(2) Is the operation of towboats, as they were operated in this case by the Shively Towboat Company, one for the public use in the conveyance of property for hire over the waters of Puget Sound, which, under the laws of the state of Washington, constitutes the operator a common carrier?

(3) Can a towboat operator who, under the laws of the state of Washington, is a common carrier, and who has filed with the state regulatory body a tariff naming rates for towing service between all points on Puget Sound and adjacent waters, enter into private contracts for towage at rates less than his published tariff?

If, in determining these questions, the court holds that the business of towage on the waters of Puget

Sound is affected with a public interest and subject to state regulation, that the Shively Towboat Company was a common carrier under the state laws, and that it could not make a private contract with the Stimson Timber Company for towage at rates less than its tariff, then the court will necessarily affirm the state supreme court. A contrary holding on any one of these questions would, of course, result in a decision in favor of plaintiff in error.

Plaintiff in error in the original statement of points to be relied upon set forth eight propositions (Rec. 105 to 107). These points have not been followed in the brief wherein one proposition is discussed under eleven subdivisions. We believe we can best present our views by first discussing the questions of public interest, common carriage, private contract, and the right of plaintiff in error to challenge the validity of the statute, and then answer in detail such of the propositions advanced by plaintiff in error as are not directly covered by our affirmative argument.

ARGUMENT.

I.

Towage Business on Puget Sound Is Affected With a Public Interest.

Before discussing the nature of the towage business on Puget Sound with reference to the public interest of the people of the state of Washington, we wish to call the court's attention to the numerous cases decided by this court on questions of public interest which establish the principles which we believe applicable to the facts with reference to the towage business.

The power to regulate a business in this manner is an exercise of the police power, and an inquiry concerning the validity of its exercise is not materially different than the consideration of questions concerning the validity of other police power acts. The general principles of law which justify an exercise of the police power are so well settled, that a detailed review of the authorities would be superfluous. A few leading cases may be referred to. In general, we may state that the validity of a police power act is determined by what may be designated as the power of "reasonable conjecture;" that is to say, unless the court can say that a state of facts could not exist which would justify the statute under consideration, it must presume that those facts do exist and is bound therefore to sustain the statute.

Munn vs. Illinois, 94 U. S. 113, 132; 24 L. Ed. 77, 86;

Antoni vs. Greenhow, 17 Otto, 769, 775; 27 L. Ed. 468, 471;

Austin vs. Tennessee, 179 U. S. 343, 361, 363; 45 L. Ed. 224, 233, 234;

Otis & Gassman vs. Parker, 187 U. S. 606, 609; 47 L. Ed. 323, 327;

Atkin vs. Kansas, 191 U. S. 207, 222; 48 L. Ed. 148, 158;

M. K. & T. Ry. Co. vs. May, 194 U. S. 267, 269; 48 L. Ed. 971, 972;

Bacon vs. Walker, 204 U. S. 311, 317; 51 L. Ed. 499, 502;

Ozan Lumber Co. vs. Union County Bank, 207 U. S. 251, 255, 257; 52 L. Ed. 195, 196, 197;

McLean vs. Arkansas, 211 U. S. 539, 548, 551; 53 L. Ed. 315, 320, 321;

Welch vs. Swazey, 214 U. S. 91, 107; 53 L. Ed. 923, 930;

Southwestern Oil Co. vs. Texas, 217 U. S. 114, 126; 54 L. Ed. 688, 694;

Watson vs. Maryland, 218 U. S. 174, 179; 54 L. Ed. 987, 990;

Lindsley vs. Natural Carbonic Gas. Co., 220 U. S. 61, 78; 55 L. Ed. 369, 377;

Barrett vs. Indiana, 229 U. S. 26; 57 L. Ed. 1050;

Tanner vs. Little, 240 U. S. 369; 60 L. Ed. 691.

In the case of *Munn vs. Illinois,* 94 U. S. 113, 132, 24 L. Ed. 77, 86, the court said:

"For our purposes *we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed.* For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. *But if it could, we*

must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."
(Italics Ours.)

In the case of *Otis & Gassman vs. Parker,* 187 U. S. 606, 609, 47 L. Ed. 323, 327, the court said:

"We cannot say *that there might not be conditions of public delirium* in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagree with the opinion." (Italics ours.)

In the case of *Atkins vs. Kansas,* 191 U. S. 207, 222, 48 L. Ed. 148, 158, the court said:

"It may be that the state, in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employes, mechanics, and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen, and enable them the better to discharge the duties appertaining to citizenship. *We have no occasion here to consider these questions, or to determine upon* which side is the sounder reason." (Italics ours.)

In the case of *McLean vs. Arkansas,* 211 U. S. 539, 548, 53 L. Ed. 315, 320, the court said:

"*If there existed a condition of affairs* concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, *it must be sustained*: if such action was ar-

bitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of the legislative power, the act must fail." (Italics ours.)

In the case of *Southwestern Oil Co. vs. Texas,* 217 U. S. 114, 126, 54 L. Ed. 688, 694, the court said:

"What were the special reasons or motives inducing the state to adopt the classification of which the oil company complains, *we do not certainly know, nor is it important that we should certainly know.*" (Italics ours.)

Among the proper subjects of an exercise of police power, the power to regulate a business which is impressed with the public interest has long been recognized. The original case upon this subject was *Munn vs. Illinois,* 94 U. S. 113, 24 L. Ed. 77, decided in 1876, in which case it was held that the maximum rates of public warehouses might be fixed by the legislature. After discussing the English decisions relating to business affected with a public interest, the court said:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control."

Answering the contention that no precedent could be found for the regulation of warehouses, the court said:

"Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligation, if they use it in this particular manner."

In *Budd vs. N. Y.*, 143 U. S. 517, 36 L. Ed. 247, it was held upon the authority of *Munn vs. Illinois,* (supra) that a grain elevator, although situated upon private property, was so affected with a public interest as to justify public regulation. In setting forth some of the reasons for this conclusion, the court said:

"The charges made by the elevator influenced the price of grain at the point of destination on the sea board, and that influence extends to the prices of grain at the place abroad to which it goes. The elevator is devoted by its owner, who engages in the business, to a use in which the public has an interest, and he must submit to be controlled by public legislation for the common good."

Similarly in the case at bar, it cannot be denied that towage charges and efficiency and continuity of towage services has a vital and material effect and in-

fluence upon the price of the finished material, particularly in the logging industry, an influence which is quite analogous to that exerted upon the grain industry by the operation of elevators at railroad terminals.

In *Munn vs. Illinois,* and *Budd vs. N. Y.* (supra), considerable importance had apparently been attached by the court to the fact that it had been shown in these two cases that the businesses there sought to be regulated had enjoyed a virtual monopoly. It was therefore thought by some lower courts and many lawyers that the rule was sustainable only as a regulation against monopoly, and accordingly in *Brass vs. N. Dakota,* 153 U. S. 391, 38 L. Ed. 757, a grain warehouse law of North Dakota was attacked upon the ground that that law regulated a large number of small warehouses in a territory where there was intense competition in the business and not even a theoretical possibility of a monopoly. The act was nevertheless sustained by the court and this contention was answered by the court in the following language (153 U. S. 403; 38 L. Ed. 761):

"The considerations mentioned are obviously addressed to the legislative discretion. It can scarcely be meant to contend that the statutes of Illinois and New York, valid in their present form, would become illegal if the law makers thought fit to repeal the clauses limiting their operation to cities of a certain size, or that the statute of North Dakota would at once be validated if one or more of her towns were to reach a population of one hundred thousand, and her legislature were to restrict the operation of the statute to such cities."

That the matter of monopoly was not deemed by the court to be controlling appears quite evident from the dissenting opinion of Justice Brewer where he points out that the record was wholly lacking in any showing of monopolistic features.

In *German Alliance Insurance Co. vs. Lewis,* 233 U. S. 389, 58 L. Ed. 1011, the court sustained a statute regulating the rates and charges of fire insurance cases. The same contentions were then made as are made in the case at bar. It was said that fire insurance contracts are private contracts in which the public has no interest, and that competition is plentiful and no monopolistic features were present. It was further said that the "test of whether the use is public or not is whether a public trust is imposed upon the property, and whether the public has a legal right to the use which cannot be denied;" and also, "where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." The court will observe that this last suggestion is substantially the argument made in the present case. Answering it, the court said (233 U. S. 407; 58 L. Ed. 1020):

"Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest, the complainant explicitly so contends, urging that the test it applies excuses the idea that there can be a public interest which gives the power of regulation as distinct from a public use, which, necessarily, it is contended, can only apply to property, not to personal contracts.

The distinction we think has no basis in principle * * *, *nor has the other contention that the service which cannot be demanded cannot be regulated.*" (Italics ours.)

Beginning upon page 410 (1021 L. Ed.), the court reviews *Brass vs. North Dakota* (supra), and points out that the possibility of a monopoly is not a controlling feature, although it is one of the reasons upon which public regulation may be based. After reviewing the nature of the insurance business and the general rules to be followed by the courts, the court said (233 U. S. 414; 58 L. Ed. 1022):

"It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times,—certainly the sense of the modern world,—is of the greatest public concern. It is therefore within the principle we have announced."

In *Terminal Taxicab Co. vs. Kutz,* 241 U. S., 252, 60 L. Ed. 984, it was held that a taxicab company could be given the status of a common carrier, although it did not serve all the public, did not travel upon fixed termini, and was not required to accept all business. The public nature of the business was with little comment based upon the decision of the court in *German Alliance Co. vs. Lewis* (supra), in the following language (241 U. S. 255; 60 L. Ed. 986):

"The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so * * *. *The public does not mean everybody all the time.*" (Italics ours.)

In *Cotting vs. Godard,* 183 U. S. 79, 85; 46 L. Ed. 92, 99, a statute regulating the charges of stockyards was held invalid as discriminatory, but at the same time the court said that it did not offend the due process clause, observing:

"While not a common carrier, nor engaged in a distinctly public employment, *it is doing a work in which the public has an interest,* and therefore must be considered as subject to governmental regulations." (Italics ours.)

In *Wilson vs. New,* 243 U. S. 332, 61 L. Ed. 755, it was held that the imminence of a nationwide railroad strike was sufficient to justify temporary regulation, by Congress, of the wages to be paid by the carriers to their employees.

In *Block vs. Hirsh,* 256 U. S. 135, 155; 65 L. Ed. 865, 870, an acute housing shortage in the District of Columbia was held sufficient to justify a temporary regulation of rents by Congressional action. Adverting to the question of public interest, the court said:

"The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. *Plainly, circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern."* (Italics ours.)

The whole subject was reviewed by Chief Justice Taft in the case of *Wolff Packing Co. vs. Court of Industrial Relations,* 262 U. S. 522, 535; 67 L. Ed. 1103, 1108. In that case, the court divided all busi-

nesses into three general classes: (1) Those carried on under authority of a public grant or franchise; (2) Certain occupations regarded as exceptional from the time of the common law, such as hotels and gristmills, and then he defined the third class as follows:

"Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly."

After pointing out that the fact that the owner of the business may sell or refuse to sell, as he likes, does not "necessarily exclude business from the class clothed with a public interest," the court continued (538; 1109):

"In nearly all the business included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."

With these repeated declarations of this court in mind, let us examine the situation with reference to the towage business generally on Puget Sound. We have attached to this brief a sketch map of the Puget Sound territory so that the court may more clearly realize the geographical and commercial features

which render the towage business of such great importance in the state of Washington. The court will take judicial notice of these geographical and general commercial matters and it will be noted that Puget Sound is a large body of navigable water with innumerable narrow inlets extending generally from the boundary line between Canada and Washington, south to Olympia, the capital of the state. Numerous thriving cities are located on the borders of this sound and many of these cities have good harbors and port districts and are vitally interested in transportation by water from point to point on Puget Sound, and one of the principal commercial industries in Seattle, Tacoma, Bellingham, Everett, Olympia and other cities is the exporting of lumber. Large lumber mills are located in all of these cities and boats are loading constantly at the numerous docks with lumber for United States coastal trade and for export all over the world.

The state of Washington has one of the largest bodies of standing timber in the United States and the logging and lumber industry in this state is one of the leading industries. Between Puget Sound and the ocean is the Olympic Peninsula, the northern part of which is largely mountainous and heavily timbered. Large timber areas are tributary to Hood Canal.

The particular towage involved in this case is from a point near Clifton at the extreme end of the canal, through that canal and across the sound to

Seattle. Hood Canal is not an artificial canal, but a long narrow arm of Puget Sound. There are no railroads in the Olympic Peninsula except short local lines which have no rail connections whereby any products can be transported by rail from the Olympic Peninsula to other parts of the state. The timber tributary to Hood Canal must be logged there and towed by water to mills on other parts of the sound. There are also large bodies of timber tributary to other portions of Puget Sound and the logs cut in such places are likewise towed to the mills, which are generally situated in the larger cities.

Lake Union and Lake Washington are fresh water lakes in Seattle. Numerous mills and industrial plants, including the mill of plaintiff in error, are located along the shores of Lake Union where they can have both rail and water service. Towboats and ships can reach Lake Union from Puget Sound through the Lake Union canal. Another canal connects Lake Union and Lake Washington. The Duwamish, Snohomish and Skagit rivers are navigable and accessible to towboats.

Two counties in the state of Washington are made up entirely of islands, namely, Island County, consisting of Whidby Island where Coupeville the county seat is located, Camano Island and some small islands, and San Juan County, a group of islands in the northern part of the sound with the county seat at Friday Harbor on San Juan Island. The people on these island counties are absolutely dependent for

their existence upon water transportation, which includes services to and from the islands by towboats.

The population of that portion of Washington adjacent to the waters of Puget Sound is increasing rapidly. New industries are locating almost daily in the towns where rail and port facilities exist, and with this increasing population and industrial development, more and more utilization must be made of the waters of Puget Sound. The steamboat business, the ferry business, and the towing business must continue to expand to meet the growing needs of commerce. No state in the Union has such an inland body of navigable water as has the state of Washington in Puget Sound. No state in the Union is therefore confronted with the same local conditions with respect to water transportation, and particularly towage, as is the state of Washington.

Let us consider more particularly the relation of the towboat to the lumber industry. The court knows that saw mills are of necessity situated either upon railroads with transcontinental connections, or in ports which have adequate docking regulations that may be reached by deep sea vessels. This is so because lumber is a product which is sold, in the main, in other than local markets and to which it must be carried either by rail or maritime carriers. Upon the other hand, in placing the forest, nature gives no heed to the needs of commerce or the location of railroad terminals. The raw material of the lumber industry, which is the log, must be taken wherever it

can be found. Many forest areas are not now served by land carriers, and probably will not be for years to come, if ever. Hood Canal, which is herein involved, is a perfect illustration of this. It has no facilities for the transportation of logs to Seattle and Tacoma, which are saw mill centers, except by water, and the court of course knows judicially that the only method of transporting logs by water is by the towage of rafts. Many mills are dependent entirely upon logs which are transported to the plant by water towage, and conversely, many logging companies must find their markets by the towage of their products over our water highways. Can the court deny that this business then is less vital to the owner of the forest, the proprietor of the mill, or the consumer of the lumber, than were the terminal warehouse in Chicago and the elevators in North Dakota and New York, considered in *Munn vs. Illinois, Budd vs. New York,* and *Brass vs. North Dakota* (supra), to the grower of the wheat and the consumer of the flour? A difference in the nature of the product can not affect the application of the principle.

Neither is towage indispensable alone to the lumber industry. Many communities of this state have no rail connection with the outside world whatsoever, and are lacking in adequate highways. Indeed some are situated upon islands. These communities are almost entirely dependent upon water transportation, both for a market for their commodities and for a supply of the necessities of their daily existence.

Many materials on account of their nature cannot be transported upon a vessel, but must be transported upon scows, barges or lighters attached to a tow boat. What difference is there in principle between conveyance in a steam boat and carriage on a barge which is towed by a steam boat? Both are essential and necessary elements of maritime commerce. If public regulation be sustainable in the one case, upon what logical ground can it be denied upon the other? The fact, if such it be, that at common law tow boats were not regarded as common carriers in determining questions of liability for loss of cargo, is wholly immaterial, for the reason that we have already shown that the power to regulate is not restricted to occupations regarded as public or quasi public at common law, but extends to businesses which are indispensable in their nature to the public.

Throughout his brief, plaintiff in error refers only to the towage of logs. This, of course, is but a portion of the towage business on Puget Sound. The question of the extent to which the towage business is affected with a public interest cannot be determined by consideration of the towage of logs only. Maritime commerce on Puget Sound cannot be carried on except with the assistance and intervention of the towage business. The maritime commerce on Puget Sound is still in a comparatively pioneer stage. There are only two cities of sufficient size to have any extensive dock facilities and equipment for loading and unloading large vessels, namely, Seattle and Tacoma.

Practically all of the other cities and towns of any size along the extensive shores of Puget Sound depend more or less upon water transportation, and all of the larger cities are endeavoring constantly to increase their port facilities. The waters in many of the narrow arms of Puget Sound are not deep enough for large vessels to land at the docks, particularly at low tide, and the use of tow boats to tow scows, barges and lighters to and from such vessels is an absolute necessity. Furthermore, the cargoes of many of the vessels are obtained from several different places, at some of which there are ample facilities for the vessel to load at the dock and at some of which the cargo must be towed to the ship's side or towed from the port of origin to Seattle or Tacoma where the ship is loaded. Dredging operations are constantly being carried on in many ports of Puget Sound, and these dredges are towed from place to place. Wharves are being constructed and repaired, and there is frequent towage of pile drivers from point to point about the sound. Some cargoes are of such character by reason of weight or size that they cannot be conveniently moved from the docks or carried to the docks by rail but must be loaded upon scows or lighters and towed to the ship's side. Instances of this sort might be multiplied indefinitely but this would constitute needless repetition. The judicial knowledge of this court will sufficiently inform it that the towage business is a vital and indispensable link in the business and economical life of the people

of Washington, and in maritime commerce on Puget Sound.

Can it be denied that this towage service is indispensable to all classes of our people who are affected in any way by commerce at sea? We venture to state that without the towage industry, maritime commerce on Puget Sound would be an entirely different thing than it is at present, if it existed at all. There is no national regulation of this branch of maritime commerce and in view of the importance of such commerce to the steadily developing Puget Sound territory, it would certainly seem a proper exercise of the police power for the state of Washington to regulate the rates, services and facilities of towboats.

Neither can the possibility of exhorbitant charges and arbitrary control of the towage business if not regulated be denied. Towing equipment is costly both in its original purchase price and in its maintenance, and considering the large area of Puget Sound and the numerous thriving cities located on its borders, the business is now in the hands of a comparatively few persons. All the towboat operators on the sound concurred in the tariff of the Northwestern Towboat Owners Association, and the tariff shows fifty such concurrences (Rec. 103). Of these fifty operators, twenty own two or more boats (Rec. 30). Thirty operators, therefore, have only one boat and it is not difficult to believe that conditions might arise where these thirty operators of limited means could be com-

pletely forced out of business by a rate war waged upon them by the more affluent operators.

The Northwestern Towboat Owners Association is the dominant factor, and that association has fourteen members (Rec. 30). The Carey-Davis Tug & Barge Company has thirteen boats in operation (Rec. 57). The American Towboat Company has twenty-seven boats in towing operations (Rec. 61, 63). There are other large companies, the extent of whose equipment is not disclosed by the record, but it is easy to believe that in the absence of regulation a few of these large companies might amalgamate and easily acquire a monopoly of the towage business on the sound.

The towage service is not one in which a person can easily engage because of the comparatively large cost of initial investment, the heavy cost of maintenance, the risks of the business, and the necessity for technical knowledge and skill. Certainly exhorbitant charges or arbitrary practices are more apt to occur in this business than in the warehouse business considered in *Brass v. North Dakota, supra,* in which case it was pointed out by Mr. Justice Brewer in his dissenting opinion that there were within the state about six hundred grain elevators owned and operated by more than one hundred twenty-five persons, and that any farmer could build an elevator sufficient for his needs for $200. Notwithstanding that fact, this court sustained the power to regulate such grain elevators and a large number of states have for years regulated

the grain warehouse and elevator business, including the state of Washington.

We submit, therefore, that the tests announced by Mr. Chief Justice Taft in the *Wolff* case, *supra,* are fully satisfied by the conditions existing with respect to the towage business in this state.

There is nothing in either the first decision in the *Wolff* case or the subsequent decision of the court in *Wolff Packing Co. v. Court of Industrial Relations,* 267 U. S. 552; 69 L. Ed. 785, which is inconsistent with our position. The statute there involved covered in substance all business which related to food, clothing, fuel and transportation, without discrimination and without classification. Furthermore, it sought to regulate not only the relation between the business and the public, but also the private relations between the employer and the employee. The opinion of the court quite emphatically points out the difference between the regulation of wages and the regulation of rates. For instance, upon page 539; 1110 of the first case, it said:

"The extent to which regulation may reasonably go, varies with different kinds of business. *The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible,* while another may involve such a possible danger of monopoly on the one hand and such disaster from stoppage on the other, that both come within the public concern and power of regulation." (Italics ours.)

The second *Wolff* case involved the power of the state to prescribe hours of labor and working condi-

tions in the same industries. This power was denied principally upon the ground that regulation of contracts between employer and employee is a different thing than regulations designed directly to protect the public.

We submit that from the standpoint of public interest, in the state of Washington, at least, and particularly upon and adjacent to the waters of Puget Sound, there is no distinction in principle between a vessel which carries cargo in its hold and one which tows cargo placed upon a scow or lighter or assembled in the form of a floatable raft. Both businesses are necessary links in the continuous chain of maritime commerce, upon which commerce the well being and prosperity of the entire state depends. An adjudication that this statute is void will forever prevent the legislature from preserving to the people the efficient performance of this necessary service and from protecting it from exorbitant rates and unreasonable demands. Cases of this kind always depend upon the particular facts and should not be disposed of on account of a theoretical resemblance to other private businesses over which unlimited power of regulation has been denied, as in the *Wolff* case.

II.

The Shively Towboat Company is a Common Carrier Under the Laws of the State of Washington.

Most of the facts with reference to the operation of the Shively Towboat Company have already been

set forth in our statement of the case. Shively had been engaged in towing for fifteen years, and the Shively Towboat Company was organized in 1918 (Rec. 25). He had two towboats and one scow during the time he was towing for Stimson, and just prior to the hearing had purchased another boat and five scows (Rec. 24, 25). The towing for Stimson was done with the "Katherine M," but this towing could be done at Shively's convenience (Rec. 42), and when not engaged in the Stimson work the "Katherine M" did general towage. During the month of June the "Katherine M" itself did $2,000 worth (Rec. 24), which would be more than it would make in that month towing for the Stimson Timber Company. Shively made tows of logs with the "Katherine M" from Tacoma, Priest Point, Everett, Utsaladdy, Chinook Bay, and other places showing a general log towing business on the sound (Rec. 28).

Shively personally solicited the Stimson Timber Company work (Rec. 29).

This record is sufficient to show that Shively was engaged generally in the towing business, specializing with the "Katherine M" in log towing, and no doubt actively soliciting such towing as was available. Except that his company was comparatively small, his operations were substantially the same in character as those of the Washington Tug & Barge Company considered by the supreme court of Washington in the case of *State v. Washington Tug & Barge Company,* 140 Wash. 613, 250 Pac. 49.

In the *Washington Tug & Barge Company* case, the supreme court was required to determine whether or not that company was a common carrier under the Washington statute, the company contending that its operations were all under private contract. The case contains much information as to the method in which the towage business is handled on Puget Sound, and we quote as follows: (L. 614)

"The evidence shows that the business of the respondent was conducted in this manner. In its office at Seattle there was what was called a dispatcher whose duties were to receive applications for service and furnish the equipment. If the service desired was a matter of consequence, it was submitted to the manager. The company had solicitors who went about the waterfront calling upon their customers and looking for business. These solicitors did not have the power to make contracts, but when business was obtained it was submitted to the dispatcher and, as said, if it was a matter of some consequence was in turn submitted to the manager.

"A witness called by the state who was formerly the dispatcher for the respondent in part testified:

'Q. While you were employed, did the defendant here have solicitors employed to solicit business for this tugboat company? A. Yes. Q. Were these solicitors employed all the time? A. Well, they were employed all the time; not all the time, possibly, as solicitors. There was other work to which they were assigned. Q. Do you know what their duties were as solicitors? A. Well, in a general way to call on the trade and get business, I presume, follow up leads. Q. Soliciting business from the general public? A. Well, whenever there was prospective business, I would say.'

"The same witness further testified:

'Q. During your employment, did you ever receive orders from the defendant to take work only

from certain specific individuals? A. I did not. Q. Was it your understanding that the work would be done for any that might apply? A. Yes.'

"An officer of the company called as a witness by the respondent testified in part as follows:

'Q. Mr. Duncan, has the Washington Tug & Barge Company solicitors on the waterfront? A. Yes. Q. Soliciting business? A. Certain business, yes. Q. This business for its tugs, barges and lighters? A. Yes.'

"The same witness further testified:

'Q. You do go after all the ships' business, don't you, towing ships? A. No. Q. You have a call flag, don't you? A. Yes. Q. You wouldn't refuse a call, would you, unless it involved extra risk? A. We wouldn't refuse a call? Q. Yes. A. If the business was desirable we would not. Q. What would you call undesirable business? A. Business going into dangerous waters, dangerous waters, where the question of collection was involved, where there was a hazard to the towboat performing the service, or if we had other work for the towboat and couldn't spare it for that job.'

"Referring again to the solicitors, he said:

'Q. And the solicitors aren't restricted to soliciting business from some particular persons, are they? If a nice job comes up they are supposed to go after it, aren't they? A. Yes, sir.'

"During the year 1922 the respondent carried an advertisement in the Seattle telephone directory which contained this:

'TUGS SCOWS BARGES
"Anytime—Anywhere"
Alaska, Coastwise, Local'

"About two years before the present action was instituted, "Anytime—Anywhere" was eliminated from the advertisement. There was inserted in its place "Private carrier." After this the business was conducted in the same manner as before.

"The respondent did not tow boom sticks, but at times had towed logs. Aside from this limitation, it

seems accurate to say that it was engaged in a general towing business. In fact, the officer whose testimony has already been referred to testified, referring to the business of the company as a jobbing business, that it was carried on largely as was that of other towboat companies. He said:

'Q. Your jobbing business, the business you describe as jobbing is the same as carried on by all these other towboat companies, isn't it? A. Largely.'

"From the foregoing, it appears to us that it must be found that the respondent held itself out in its dealings and course of business with the public as being ready and willing for hire to perform the services rendered by it and within the field of its operations for the public generally."

The Shively Towboat Company concurred in the tariff of the Northwest Towboat Owners Association (Rec. 43). The nature of such concurrence is shown in the findings of the department of public works as follows (Rec. 10):

"Respondent, Shively Towboat Company, has filed with this department concurrence in the tariffs of the Northwestern Towboat Owners Association, whereby it made the Northwestern Towboat Owners Association its agent for the compilation, filing and publication of tariffs and adopted as its own tariffs filed by the Northwestern Towboat Owners Association."

This tariff of the Northwestern Towboat Owners Association is not in the record, but it is stipulated that the material parts of the tariff are (Rec. 102):

"It is further agreed that Department's Exhibit No. One is the tariff No. Four filed by the Northwestern Towboat Owners Association in accordance with Order No. 5544 of the Department of Public Works of the State of Washington, which tariff No.

Four became effective September 30, 1923. That said exhibit consists first of maps, showing together all of the waters of Puget Sound and adjacent waters divided into zones, each bearing an individual number. In the supplementary notes thereto it is said: 'This tariff names rates on towing service between all points on Puget Sound and adjacent waters. The maps which are attached to and are a part of this tariff show the zones into which the entire territory is divided and all points within any one zone will take the rate for that zone.' It then contains two printed pages showing the method of application of the rates. This is followed by a list of the towboat operators, fifty in number, concurring in the tariff, which includes the name of Shively Towboat Company. This is then followed by the rates to be charged for towing ships and scows and logs between zones, and rates for other services which may be rendered by tugs, covering approximately seventeen pages of printed tabulations, which in turn is followed by several pages of base rates for towage between certain points. On the page devoted to the towage of fir logs appears the following: 'Towing logs from Clifton to Lake Union: $25.00 per section; minimum 16 sections; each section not to exceed 6,000 square feet.'

"At the top of said explanatory notes are the words: 'All tows at owner's risk,' and a further note is attached reading as follows: 'Note.—This tariff is intended to name specific rates for all services on Puget Sound and adjacent waters. It is improper to apply any rate other than that which is named or authorized by this tariff. In case any operator is offered a movement for which there is no specific tariff charge, the operator should call this to the attention of the Northwestern Towboat Owners Association by addressing the secretary, Mr. W. T. Isted, 270 Collins Bldg., Seattle, Washington.'

"It is agreed that this summary of said exhibit is a fair statement of all facts shown in said exhibit material to the hearing of this cause in the Supreme Court of the United States, which summary shall be

used in place of said exhibit, and that said exhibit shall not be included in said transcript."

The Washington statutes with reference to filing of tariffs by common carriers are found in sections 9, 14 and 16, of chapter 117, of the Laws of 1911, being sections 10345, 10350 and 10352, Remington's Compiled Statutes, and in so far as material to this proceeding provide:

Section 10345:

"All charges made for any service rendered or to be rendered in the transportation of persons or property, or in connection therewith, by any common carrier, or by any two or more common carriers, shall be just, fair, reasonable and sufficient. * * *"

Section 10350:

"Every common carrier shall file with the commission and shall print and keep open to the public inspection schedules showing the rates, fares, charges and classification for the transportation of persons and property within the state between each point upon its route and all other points thereon. * * *"

Section 10352:

"The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission. * * *"

The nature of Shively's operations and the effect of his filing of a tariff were held by the state supreme court to bring him within the statutory definition, the

court saying in *State ex rel. Stimson Timber Co. v. Kuykendall,* 137 Wash. 602, 606 (Rec. 72, 75):

"The evidence shows that the towboat company has two boats, and some barges, which it uses in its business. The business of the appellant is sufficient to take the greater portion of the time of the larger of these towboats. The towboat company, in common with a large number of like companies, in compliance with the law heretofore quoted, filed its tariff of rates for towing. This tariff provides for a wide and varying schedule for work on Puget Sound, governed by different zones. The tariff provides rates, not alone for the towing of logs, but for the towing of piling, boom sticks, ships, dismantled vessels, scows, barges, pile drivers, dipper dredges, suction dredges, and rates per hour for assisting, shifting and docking vessels, scows and barges. It will thus be seen that by its tariff the towboat company is engaged in practically all the different kinds of work which can feasibly be performed by a towboat. It must be apparent that one who holds himself out to the world, through a regularly filed tariff, as willing to perform all the manifold forms of towing which the public may reasonably be expected to require, is devoting his property to a public use. It is difficult to see how they could be more fully devoted to the public use."

Furthermore we are satisfied that the Shively Towboat Company, having concurred in the tariff and accepted any benefits that the act may extend to towboat operators, would be estopped from contending that the act is unconstitutional under the rule repeatedly announced by this court.

Pierce Oil Corporation v. Phoenix Refining Co., 259 U. S. 125, 128; 66 L. Ed. 56, 57.

Wall v. Parrot Silver & Copper Mining Company, 244 U. S. 407, 411; 61 L. Ed. 1229, 1231.

Grand Rapids & Indiana Railway Co. v. Osborne, 193 U. S. 17, 29; 48 L. Ed. 598, 604.

Shepard v. Barron, 194 U. S. 553, 567; 48 L. Ed. 1115, 1120.

Pierce v. Somerset Railway, 171 U. S. 641, 648; 43 L. Ed. 316, 319.

Electric Co. v. Dow, 166 U. S. 489, 490; 41 L. Ed. 1088, 1089.

Fickle v. The Taxing District of Shelby County, 145 U. S. 1, 24; 36 L. Ed. 601, 607.

Great Falls Manufacturing Co. v. Garland, 124 U. S. 581, 600; 31 L. Ed. 527, 533.

In *Wall v. Parrot Silver & Copper Mining Company, supra,* the court said:

"There remains the contention that the statutes of Montana which we have epitomized, if enforced, will deprive the appellants of their property without due process of law because they provide that sale may be made of all the assets of the corporation when authorized by not less than two thirds of the outstanding capital stock of the corporation, and that the plaintiffs must accept either the payment for their shares which this large majority of their associates think sufficient, or, if they prefer, the value in money of their stock, to be determined by three appraisers, or, still at the election of appellants, by a court and jury.

"*This record does not call upon us to examine into this challenge of the validity of these statutory provisions,* similar as they are to those of many other states and of a seemingly equitable character, *for the reason that the appellants, by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes,* which is still pending, *waived their right to assail the validity of them.* * * * *They cannot claim the benefit of statutes and afterwards assail their validity.* There is no sanctity

in such a claim of constitutional right as prevents its being waived as any other claim of right may be." (Italics ours)

The Shively Towboat Company is not here contesting the validity of the state law, and we believe that the Stimson Timber Company must be bound by the rule which would apply to the Shively Towboat Company. Since the Shively Towboat Company, having filed its tariff and accepted the benefits of the act, is bound by its tariff, the same obligation must rest upon the Stimson Timber Company. It is impossible to bind the Shively Towboat Company to a tariff rate and at the same time say that the Stimson Timber Company is not bound and may pay less than the tariff rate. Not only is Stimson presumed to know the law with reference to the operation of towboats, but the record shows that he was personally familiar with their operation under filed tariffs as he arranged with the Northwestern Towboat Owners Association to extend their rates to Clifton when he commenced operations (Rec. 60) and later notified the Department of Public Works he had no objection to the tariff filed by Croft increasing his rate (Rec. 36).

The statute applies only to towboats operated for the public use in the conveyance of property for hire over and upon the waters within the state. There can be no controversy in this question but that towage engaged in by the Shively Towboat Company was a conveyance of property for hire over and upon the

waters within the state. The only possible controversy is as to whether the towage was "for the public use." We believe the showing of the record as to the general character of towage services performed by the Shively Towboat Company, together with the interpretation placed upon such services by the supreme court, not only in the case here under review but in the later case of *State v. Washington Tug & Barge Co., supra,* conclusively determine that the Shively Towboat Company is a common carrier under the state statute.

III.

THE SHIVELY TOWBOAT COMPANY, BEING A COMMON CARRIER AND HAVING FILED A TARIFF NAMING RATES FOR ALL TOWING SERVICES ON PUGET SOUND, CANNOT MAKE A PRIVATE CONTRACT FOR TOWAGE AT RATES LESS THAN ITS PUBLISHED TARIFF.

Section 18, chapter 117, Laws of 1911, being section 10354, Remington's Compiled Statutes, provides in part as follows:

"No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of persons or property, or for any service in connection therewith than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; * * *"

Section 20, chapter 117, Laws of 1911, being section 10356, Remington's Compiled Statutes, provides in part as follows:

"No common carrier shall, directly or indirectly, by any special rate, rebate, drawback, or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered in the transportation of persons or property except as authorized in this act, than it charges, demands, collects or receives from any person or corporation for doing a like and contemporaneous service in the transportation of a like kind of traffic under the same or substantially similar circumstances and conditions."

Notwithstanding these statutory provisions, in addition to the provisions above quoted with reference to the filing of tariffs, and notwithstanding the fact that Shively had concurred in the tariff of the Northwestern Towboat Owners Association, as above set forth, he attempted to give a preferential rate to the Stimson Timber Company. It is erroneously contended by the plaintiff in error that Shively and Stimson had a right to make such agreement, that such an agreement was a private contract between a private carrier and a shipper not covered by the statute. The fact that plaintiff in error, however, might desire to enter into a private contract with a private carrier for the towage of its logs did not give it the right to insist that a common carrier violate its published tariffs and the state law.

The provision in section 10354, *supra,* is substantially the same as that found in section 6 of the interstate commerce act with reference to which this court has said in the case of *Louisville & N. R. Co. v Maxwell,* 237 U. S. 94, 97, 59 L. ed. 853, 855:

"Under the interstate commerce act, *the rate of the carrier duly filed is the only lawful charge.* Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. *Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed.* This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination." (Italics ours.)

Again in the case of *Dayton Coal & Iron Co. v. Cincinnati N. O. and T. P. R. Co.,* 239 U. S. 446, 451, 60 L. ed. 375, 379:

"That it is essential to the maintenance of uniform rates and the avoidance of rebates and preferential treatment that the tariff rates filed with the Commission according to the interstate commerce act, while in force, shall be the only rates which the carrier may lawfully receive or the shipper properly pay is too thoroughly settled by the former decisions of this court to require further discussion."

And the case of *Keogh v. Chicago & N. W. R. Co.,* 260 U. S. 156, 163, 67 L. ed. 183, 187:

"The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights, as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier."

See also:

Kansas City Southern Railway Co. v. Carl, 227 U. S. 639; 57 L. Ed. 683.

Boston & M. R. Co. v. Hooker, 233 U. S. 97; 58 L. Ed. 868.

Oregon-Washington R. & N. Co. v. Seattle Grain Co., 106 Wash. 1, 5; 178 Pac. 648.

This principle that the common carrier cannot make private contracts at variance with its published tariff is applicable to all its regulations and not alone to rates, as was said by this court in *Southern R. Co. v. Prescott,* 240 U. S. 632, 638; 60 L. Ed. 836, 839:

"It is also clear that, with respect to the service governed by the Federal Statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates * * *, and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published tariffs relating to any of the services within the purview of the act."

Chicago & A. R. Co. v. Kirby, 225 U. S. 155; 56 L. Ed. 1033.

Atchison T. & S. F. R. Co. v. Robinson, 233 U. S. 173; 58 L. Ed. 901.

If the Shively Towboat Company desired to name a special rate for towage from Stimson's camp or from Clifton which would apply from Stimson's camp to Lake Union, it could have done so in a lawful and proper manner by withdrawing its concurrence in the Northwestern Towboat Owners Association in so far as it related to rates named in the Northwestern Towboat Owners Association's tariff applicable from Clifton to Lake Union and filing a tariff of the Shively Towboat Company naming the rate it desired to place in effect for such service. This is the

manner in which C. C. Croft handled the Stimson Timber Company business during the time he was towing for that company (Rec. 44). Inasmuch as Shively did not proceed to name his rates in a lawful manner, he was unquestionably prohibited from entering into private contract with Stimson for towage at rates which differed from the rates named in the tariff in which he had concurred.

A common carrier cannot evade regulation by the device of making private contracts with its customers.

Producers Transportation Co. v. Railroad Commission, 251 U. S. 228; 64 L. Ed. 239.
Goldsworthy v. Malloy, 119 Atl. 693 (Md).
State Public Utilities Commission v. Monarch Refrigerating Co., 108 N. E. 716 (Ill.)
Restivo v. West, 129 Atl. 884 (Md.)
Smitherman & McDonald v. Mansfield Hardwood Lumber Co., 6 Fed. (2nd) 29.
Austin Bros. Transportation Co. v. Bloom, 147 N. E. 387.
Red Ball Transit Co. v. Marshall, 8 Fed. (2nd) 635.
Chicago & E. I. Railway Co. v. Chicago Heights Terminal T. R. Co., 147 N. E. 667 (Ill.)

IV.

Plaintiff in Error Not in Position to Challenge the Constitutionality of the State Statute.

The question of whether or not the towage business on Puget Sound is affected with a public interest and therefore subject to regulation by the state is one

of considerable importance and one which we are in hopes this court will definitely determine in this case. However, in our brief and argument before the state supreme court we urged that the plaintiff in error, having applied to the department of public works for relief, was estopped from challenging its jurisdiction or the validity of the statute under which it acted. We deem it proper, therefore, to briefly present our contentions in that respect to this court.

This proceeding was instituted by an informal complaint consisting of a letter from the Stimson Timber Company to the department of public works (Rec. 7), which alleged that the tariff rate was unreasonable because it differed from the rate agreed upon between the parties, and that the particular transportation in question was not affected with a public interest. The letter requested "a hearing upon said rate." It did not allege that the statute was void, and it expressly asked the department of public works to determine the reasonableness of the rate, and to determine whether or not the rate applied in view of the agreement between the parties involved. If the department of public works after hearing had found that although the Shively Towboat Company had concurred in the tariff and was generally a common carrier, yet this particular service had been rendered under a private contract the terms of which contract governed notwithstanding the general tariff, plaintiff in error would have been well satisfied with that finding.

Furthermore, if the department of public works after hearing had found that the rate named in the tariff of $25 per section for towing from Clifton to Lake Union was unreasonable and excessive and that a just, reasonable and sufficient rate for such service was $16.50 per section and had ordered the Shively Towboat Company or the Northwestern Towboat Owners Association to file a tariff naming the $16.50 rate effective as of March 1, 1924, plaintiff in error would have been well pleased with such an order and would have obtained the exact relief desired.

Having applied to the department for a hearing upon the rate and the department having held such hearing and made findings and entered an order which is contrary to the contentions of plaintiff in error, plaintiff in error is not now in the position to allege that the statute of the state is unconstitutional or that the department of public works acting solely under the authority of such statute was acting in excess of its jurisdiction. The only questions which the plaintiff in error can properly raise upon a review of the department's order are that notwithstanding the Shively Towboat Company was operating as a common carrier under a regularly filed tariff, it had the right to make a private contract with the Stimson Timber Company, that it had made such a contract, and that such contract superseded the tariff rate, and that in any event the rate named in the tariff, if held to govern, is unreasonable and excessive. This latter contention has been abandoned on the appeal to this

court and the only question which it may now raise is the one covered in this brief under our third heading.

It is, we think, well settled law that a party who has applied to any tribunal for relief is estopped to deny the jurisdiction of such tribunal or the constitutionality of the statute under which the tribunal acts. In addition to the cases cited under our third heading to the effect that the Shively Towboat Company would be estopped, the following cases are more particularly applicable to the situation of plaintiff in error:

Merchants' Heat & Light Co. v. Clow & Sons, 204 U. S. 286; 51 L. Ed. 488.

Texas & Pacific Railway Co. v. Easton, 214 U. S. 153; 53 L. Ed. 946.

American Mills Co. v. American Surety Co., 260 U. S. 360; 67 L. Ed. 306.

Hurley v. Commission of Fisheries of Virginia, 257 U. S. 223; 66 L. Ed. 206.

12 Corpus Juris 769.

15 Corpus Juris 845.

The direct contention that the state statute violated the state and federal constitution was first made by plaintiff in error in its reply brief in the state supreme court. It was then too late for the defendants in error to adequately brief the question of public interest, but fortunately this question was fully presented to the state supreme court in an *amicus curiae* brief filed by Oakley & Thompson, of Tacoma, Washington, on behalf of the Northwestern Towboat Owners Association. We have borrowed freely from that brief in the preparation of our brief in this court.

V.

Answer to the Contentions of the Plaintiff in Error.

The foregoing argument has, we think, substantially answered all of the contentions of plaintiff in error pertinent to this controversy, but we deem it advisable to run briefly over the itemized points raised in the opening brief.

(*a*) At page 21 of the brief of plaintiff in error, the contention is made that private towage is not optional under the statute. The substance of this contention is that the state statute provides a penalty for violations thereof, and that in view of this penalty the Shively Towboat Company cannot be held to have voluntarily filed a tariff. This is a new idea which has occurred to plaintiff in error for the first time upon the appeal to this court. It has never been urged before and we think there is no merit in the contention.

At page 25 of the brief the statement is made that under the statute the Shively Towboat Company, as well as all other persons who desire to engage in the business of towing logs either under private contract or otherwise, are compelled to file a tariff. This statement cannot be borne out by the statute. The statute expressly declares that towboats are only common carriers when engaged in the conveyance of persons or property for hire *for the public use.*

The federal court will follow the state court's interpretation of the state statutes. Since the de-

cision of the state supreme court here under review that court has decided the case of *State v. Washington Tug & Barge Co.*, 140 Wash. 613; 250 Pac. 49. That was a penalty action by the state against the Washington Tug & Barge Co. for violations of its tariff. The tariff was the same as that here involved. The state had alleged numerous violations, and the towage company in its answer alleged that the tariff had been filed under duress to avoid possibility of penalties under the state statute and contended that in each of the instances in which the tariff was alleged to have been violated the service had been in fact that of a private carrier under private contract and not for public use. The question to be determined is stated by the supreme court of the state as follows:

"The question is whether the respondent was a public or private carrier. This is largely a question of fact or, as in this case, a conclusion from the facts which are not in serious dispute. The question is not whether the respondent was a public carrier at common law but whether it comes under Rem. Comp. Stat., sec. 10344, which provides that a vessel which includes towboats, tugs, scows, barges and lighters shall be a common carrier when

"'* * * operated for the public use in the conveyance of persons or property for hire over and upon the waters within this state * * *'

"To make the question more specific, it is whether the respondent was operating its towboats, etc., 'for the public use.'

"That the service was rendered and for hire is admitted."

This statement of the issues shows clearly that the supreme court construes the statute to apply only

to towboats operated for the public use and not to have any application to towboats operated in private use.

In view, therefore, of the express language in the statute and the interpretation accorded such language by the state supreme court, there is no merit in the contention of plaintiff in error that the statute prohibits private towage.

Furthermore, although the statute requires every common carrier to file the tariff, assuming that Shively is a common carrier, it did not require him to concur in the particular tariff of the Northwestern Towboat Owners Association. He was at all times free under the statute to file his own tariff, naming the rates he desired to charge. Such was the practice followed by C. C. Croft in doing the work for Stinson (Rec. 44), and Shively could have done the same.

At page 27 of the brief of plaintiff in error, and again at page 54, stress is laid upon the statement in the tariff, "all tows at owner's risk." The question of the validity of that provision in the tariff is not before this court. It is possible that under the statute making towboats engaged in public service common carriers, they are subject to the ordinary common carrier liability. On the other hand, it may also be that inasmuch as they are statutory common carriers and the statute prescribes no rule of liability for loss or damage to tows they have no greater liability than has been recognized generally by courts as the liability of a towboat as distinguished from the liability of a common carrier steamboat. It is unnecessary for

this court to determine the extent of their liability in this controversy. That question can only arise in connection with a suit for damages against the towboat for loss or injury to a tow.

(*b*) At page 28 of the brief of plaintiff in error, the contention is made that acquiescence by the Shively Towboat Company in rate fixing is not binding on the owner of the tow. We believe this contention has been substantially answered under our third heading, and in any event the contention of plaintiff in error is based upon his persistent statement not borne out by the statute that the statute prohibits private contract. Shively voluntarily filed his concurrence in the tariff and held himself out as a common carrier under the statute, and by so doing placed himself in a position where he could not make a private contract for towage on any different basis than that named in his tariff. The fact that Shively by his act prevented Stinson from making a contract with a common carrier different from the tariff did not in any way affect Stinson's right to make any legitimate private contract with a private towboat that he might see fit to do.

(*c*) At page 30 of the brief of plaintiff in error, the contention is made that a towboat is not a common carrier. It is conceded that the weight of authority holds that towboats are not common carriers. There are, however, a number of early cases to the contrary:

Smith v. Pierce, 1 La. 350, 355;
Bussey v. Mississippi Valley Transportation Co., (La.) 13 Am. Rep. 120;
White v. The Mary Ann, 6 Cal. 462; 65 Am. Dec. 523;
Clapp v. Stanton, 96 Am. Dec. 417 (La.);
Sproul v. Hemingway, 14 Pick. 1, 6 (Mass.).

In the *Sproul* case, Mr. Chief Justice Shaw says:

"The steamboat was engaged in an open, public, distinct branch of navigation, that of towing and transporting vessels up and down the Mississippi, for a certain toll or hire, for the profit of the owners. The defendant seemed to have the same relation to the steamboat, that a freighter has to a general ship, or a passenger to a packet. The defendant participated in the benefit but incidentally and collaterally; he did not share in the profits of the business, one which from its magnitude may well be called the trade of towing. Such a trade may be considered as much a public and distinct employment, as that of freighting or conveying passengers."

So far as we have been able to discover, none of the cases holding that a towboat is not a common carrier have arisen under a statute such as the Washington law now before this court. This distinction was apparently in the mind of the supreme court of Washington, although not definitely passed upon in the case of *Cary-Davis Towing Co. v. Spradley*, 115 Wash. 93, 98, 196 Pac. 655, when the court said:

"We have not overlooked the argument that the ordinary rules applicable to common carriers generally do not apply when the common carrier is a tug boat. But we can see no reason for the distinction. Nor do the cases cited in its support maintain the principle."

In that case the Cary-Davis Towing Company admitted that it was a common carrier and governed by the public service laws of this state.

We do not consider the decisions from various courts with respect to the common law liability of towboats to have any bearing upon the controversy now before this court. We have endeavored to show that the conditions existing within the state of Washington are such that the business of towage on Puget Sound is affected with a public interest. Such being true within this state, the common law rules with reference to towboats are not applicable. This has been true with reference to all exertions of the police power in the regulation of warehouses, insurance companies, etc. Whenever local conditions become such that the common law rules are no longer applicable to the existing conditions, the state, in the exercise of its police power may prescribe rules at variance with the common law.

(*d*) At page 33 of the brief of plaintiff in error, the contention is made that the towage of logs in Puget Sound is not affected with a public interest. Reference is made to the case of *Tyson & Bro.-United Theater Ticket Officers v. Banton*, 47 Sup. Ct. Adv. Sheets 630; 71 L. ed. Adv. Sheets 693. This is the latest decision of this court in which the question of a business affected with a public interest is considered. We find nothing in the decision which would lend support to the contention that the towage business on Puget Sound is not affected with a public interest.

Many of the cases heretofore cited under the first heading in our brief are re-examined by the court, and at page 428 of the Supreme Court Advance Sheets and page 495 of the Law Edition Advance Sheets the following statement is made with reference to what is a business "affected with a public interest:"

"The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238, 246, 22 S. Ct. 881, 46 L. Ed. 1144, but exists only where the business or the property involved has become 'affected with a public interest.' This phrase, first used by Lord Hale 200 years ago (Munn v. Illinois, 94 U. S. 113, 126, 24 L. Ed. 77), it is true, furnishes at best an indefinite standard, and attempts to define it have resulted, generally, in producing little more than paraphrases, which themselves require elucidation. Certain properties and kinds of business it obviously includes, like common carriers, telegraph and telephone companies, ferries, wharfage, etc. Beyond these, its application not only has not been uniform, but many of the decisions disclose the members of the same court in radical disagreement. Its full meaning, like that of many other generalizations, cannot be exactly defined—it can only be approximated."

and after a summary of the leading cases, including the warehouse cases, the following statement is made at page 431 of the Supreme Court Advance Sheets and page 499 of the Law Edition Advance Sheets:

"From the foregoing review it will be seen that each of the decisions of this court upholding govern-

mental price regulation, aside from cases involving legislation to tide over temporary emergencies, has turned upon the existence of conditions, peculiar to the business under consideration, which bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use."

We have endeavored to show that the towage business on Puget Sound is one in which the "existence of conditions peculiar to the business under consideration" bears such a "substantial and definite relation to the public interest" as to justify regulation by the state of Washington. The final conclusion of this court in the *Tyson* case was that places of amusement or entertainment are not public utilities or so affected with a public interest as to justify legislative regulations. There is nothing inconsistent in such a conclusion and a holding that under the conditions existing in Washington the towage business is affected with a public interest and subject to regulation.

At page 33 of the brief of plaintiff in error, the erroneous statement is made that in the statute now under consideration the Washington legislature "does not attempt to prescribe the manner of operation or the quality of the service to be rendered, but solely the price." Chapter 117, Laws of 1911, is a complete public utility act. A number of sections have been previously cited in this brief. Section 53 of that chapter, being section 10369, Remington's Compiled Statutes, provides:

"Whenever the Commission shall find, after such hearing, that the rules, regulations, practices, equipment, appliances, facilities or services of any such common carrier in respect to the transportation of persons or property are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the Commission shall determine the just, reasonable, safe, adequate, sufficient and proper rules, regulations, practices, equipment, appliances, facilities or service to be observed, furnished, constructed or enforced and be used in the transportation of persons and property by such common carrier, and fix the same by its order or rule as hereinafter provided."

At page 37 of the brief of plaintiff in error, much stress is laid upon the Washington decision of *Healy Lumber Co. v. Morris,* 33 Wash. 490. This was an eminent domain case not controlling in a case of this character and not followed by the Washington supreme court, although urgently pressed upon it by plaintiff in error in the state litigation.

We regret that the record in this case does not contain very much definite information with respect to the character and extent of the towage business on Puget Sound. As we have repeatedly stated, the controversy before the department of public works was based upon the theory that a private contract had been made to which the tariff did not apply, or that in any event the rate was unreasonable. No serious attack was made upon the power of the state to regulate the towage business. Consequently there was no occasion before the department to develop the facts with reference to the towage business in general. Such scattered facts as appear in the record were rather

incidental to the rate inquiry. Defendants in error are therefore obliged to rely largely upon such facts as the court will judicially notice with respect to geographical and commercial conditions on Puget Sound. It seems that if plaintiff in error wished to challenge the constitutionality of an important state statute, some duty rested upon him by positive evidence to show that the operation of the towage business was not such as to constitute a public service or a matter affected with a public interest, or at least give such warning to the department of public works as would enable it to accumulate and put in the record facts with reference to the industry which might be of value to the court.

It has been held repeatedly by this court and other courts that carriers by water transporting goods generally for the public for hire, whether employed in internal, coasting or in foreign commerce, are common carriers. 24 R. C. L. 1296, sec. 402. It has also been held from very early days that the erection, operation and charges of wharves are subject to regulation, as the business of conducting a wharf is affected with a public interest. 28 R. C. L. 29, sec. 12, p. 41, sec. 28. The same public service act which is now brought before this court with respect to towboats has provisions applicable to steamboats and wharves, as well as other utilities. There are a large number of public wharves at numerous points along the shores of Puget Sound, and steamboats carrying passengers and property ply in all directions over the

waters of such Sound. There are also a great many ferries plying between various cities on the Sound carrying passengers, freight and particularly automobiles, and these ferries have been held to be common carriers under the jurisdiction of the department of public works.

Nearhoff v. Department of Public Works, 134 Wash. 677, 236 Pac. 288.

If towboats are not subject to regulation, we have the peculiar situation that towboats, using, in many instances, the same docks and wharves as steamboats and ferries, plying over the same waters between the same points, and conveying, in many instances, the same character of property, are exempt from regulation. It seems to us that the conditions existing in this state are such that towboats engaged in general public service are certainly common carriers and subject to regulation.

(*e*) At page 41 of the brief of plaintiff in error, the contention is made that the towage of logs on Puget Sound is not common carriage. Counsel again and again reiterates his theory that the state statute has prohibited private contracts for towage, which we have pointed out before is not the fact. We believe this contention has been fully answered in our second point, except we desire here to cite the decisions with reference to taxicabs as common carriers. In many respects the taxicab in its manner of operation corresponds to the method of operating towboats, that is, there are no fixed termini and no regular

route, and the taxicab makes a special arrangement with each customer, and perhaps serves a limited portion of the public. All of these objections have been urged against regulation of taxicabs, but such vehicles have been held to be common carriers. This court said, in *Terminal Taxicab Co. v. Kutz,* 241 U. S. 252, 254; 60 L. Ed. 984, 986:

"The next item of the plaintiff's business, constituting about a quarter, is under contracts with hotels by which it agrees to furnish enough taxicabs and automobiles within certain hours reasonably to meet the needs of the hotel, receiving the exclusive right to solicit in and about the hotel, but limiting its service to guests of the hotel. We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. *No carrier serves all the public. His customers are limited by place, requirements, ability to pay, and other facts.* But the public generally is free to go to hotels, if it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab. We should hesitate to believe that either its contract or its public duty allowed it arbitrarily to refuse to carry a guest upon demand. We certainly may assume that in its own interest it does not attempt to do so. The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. *German Alliance Ins. Co. v. Lewis,* 233 U. S. 389, 58 L. ed. 1011, L. R. A. 1915C, 1189, 34 Sup. Ct. Rep. 612. The public does not mean everybody all the time. See *Peck v. Tribune Co.,* 214 U. S. 185, 190, 53 L. ed 960, 962, 29 Sup. Ct. Rep. 554, 16 Ann. Cas. 1075." (Italics ours.)

In *Cushing v. White,* 101 Wash. 172, 172 Pac. 229; L. R. A. 1918F 463, the Washington court made a thorough examination of what constitutes a com-

mon carrier and held that for hire automobiles are common carriers. The court stated at page 181:

"Authorities to the same effect may be cited indefinitely; but from the foregoing it is manifest that a common carrier is one whose occupation is the transportation of persons or things from place to place for hire or reward, and who holds himself out to the world as ready and willing to serve the public indifferently in the particular line or department in which he is engaged; *the true test being whether the given undertaking is a part of the business engaged in by the carrier which he has held out to the general public as his occupation, rather than the quantity or extent of the business actually transacted, or the number and character of the conveyances used in the employment.* On the other hand, if the undertaking be a single transaction, not a part of the general business or occupation engaged in, as advertised and held out to the general public, then the individual or company furnishing such service is a private and not a common carrier. In either case the question must be determined by the character of the business actually carried on by the carrier and not by any secret intention or mental reservation it may entertain or assert when charged with the duties and obligations which the law imposes.

"An analysis of the findings of the lower court discloses that appellants' calling is characterized by the following features: (a) they are engaged in what is known as the automobile rent business; (b) each of them owns and operates a motor propelled vehicle for hire, either at a charge of so much a trip or so much per hour; (c) each has a fixed stand or place where his car is available to prospective customers during many hours of the day and night; and (d) they transport passengers from place to place. Here we have carriers engaged in transporting persons for hire as a business or occupation, and impliedly and practically holding themselves out to the public as ready and willing to serve indiscriminately all who

may desire the use of their facilities. *The fact that they have no fixed schedule of charges, do not operate over definite routes, do not upon all occasions load the car to its full capacity, and reserve the right to refuse to transport passengers whether their automobile is engaged or not, is wholly immaterial; their character is determined by their public profession,* not by undisclosed reservations or secret intentions." (Italics ours.)

In the case of *State ex rel. C. M. & P. S. R. Co. v. Public Service Commission,* 77 Wash. 529, 137 Pac. 1057, the court held that a spur track intended primarily for the immediate use of a single shipper, open on reasonable terms to the use of the public, is a public use, saying at page 545:

"That a spur track intended primarily for the immediate use of a single shipper, but open upon reasonable terms to the use of all members of the public who may have occasion to use it, is a public use, is sustained by overwhelming authority. *Chicago & N. W. R. Co. v. Morehouse,* 112 Wis. 1, 87 N. W. 849, 88 Am. St. 918, 56 L. R. A. 240; *Chicago, B. & N. R. Co. v. Porter,* 43 Minn. 527, 46 N. W. 75; *DeCamp v. Hibernia R. Co.,* 47 N. J. L. 43; *Butte, A. & P. R. Co. v. Montana U. R. Co.,* 16 Mont. 504, 41 Pac. 232, 50 Am. St. 508, 31 L. R. A. 298; *Chicago Dock & Canal Co. v. Garrity,* 115 Ill. 155, 3 N. E. 448; *Railway Co. v. Petty,* 57 Ark. 359, 20 L. R. A. 434; *Kettle River R. Co. v. Eastern R. Co.,* 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; *National Docks R. Co. v. Central R. Co.,* 32 N. J. Eq. 755; *Hays v. Risher,* 32 Pa. St. 169; *Zircle v. Southern R. Co.,* 102 Va. 17, 45 S. E. 802, Am. St. 805."

In the case of *State ex rel. N. P. R. Co. v. Public Service Commission,* 95 Wash. 376, 163 Pac. 1143, it was held that public necessity for a joint freight rate

does not depend on the number of persons asking for the change and may be based upon the application of but one person, the court saying:

"It is also asserted that there is no evidence to support the commission's finding of public necessity, because it was shown that Taylor & Kemp were the only persons who appeared at the hearing and asked for the change. We do not wish to hold that the existence of a public necessity is determined by the number of people asking for the same. The case of *State ex rel. Chicago, Milwaukee & Puget Sound R. Co. v. Public Service Commission,* 77 Wash. 529, 137 Pac. 1057, is somewhat analogous to the present situation. Therein it was held that the character of way, whether public or private, is not determined by the extent of the use, and if all the people have a right to use it, no matter if but one person asks for its construction, it is a public way."

(*f*) At page 44 of the brief of plaintiff in error, the contention is made that private carriage cannot be made common carriage by legislative fiat. We have no quarrel with this argument. The supreme court of Washington has, in considering the state auto transportation act, applied the same rule subsequently announced by this court in *Michigan Public Utilities Commission v. Duke,* 266 U. S. 570, and *Frost v. Railway Commission,* 271 U. S. 583. The Washington auto transportation act, being chapter 111, Laws of 1921, required all common carrier motor vehicles to obtain certificates of public convenience and necessity before operating upon the highways of the state, and this court has held that such statute does not apply to motor vehicles engaged in the trans-

portation of property under private contract and not hauling for the public generally.

Carlson v. Cooney, 123 Wash. 441; 212 Pac. 575;

Davis & Banker v. Metcalf, 131 Wash. 141; 229 Pac. 2.

Undoubtedly our court would apply the same rule to towboat operations if the operator was in fact not serving the public, but towing only under an exclusive private contract. The Shively Towboat Company and the Stimson Timber Company, however, were not in position to claim such a private contract where the towboat company concerned had filed its tariff and was engaged generally in towage service and was attempting to get towage business to the extent of its facilities from the public generally and was not engaged in the exclusive towage for the Stimson Timber Company.

One of the cases relied upon by plaintiff in error under this heading is *Producers Transportation Co. v. Railroad Commission,* 251 U. S. 228, 64 L. Ed. 239. In this case it was said by way of dictum that "if the pipe line was constructed *solely* to carry oil for particular producers under strictly private contracts," then it could not be converted without its consent into a public carrier by a mere legislative fiat. Continuing, however, the court pointed out that the State Court had found that the company had voluntarily devoted its line to a public use, which conclusion was based, in part at least, upon the articles of incorpora-

tion of the company, and the fact that it had exercised power of eminent domain and public regulation was therefore sustained. Adverting to the question of whether the effect of that voluntary election might be avoided by the making of private contracts, the court said:

"A common carrier cannot, by making contracts for future transportation, or by mortgaging its property, or pledging its income, prevent or postpone the exertion by the state of the power to regulate the carrier's rates and practices. Nor does the contract clause of the constitution interpose any obstacle to the exertion of that power."

(*g*) At page 47 of the brief of plaintiff in error, the contention is made that the decision in this case is not controlled by *Munn v. Illinois,* 98 U. S. 113. We believe this has been fully answered in the first heading of our brief.

At page 49, plaintiff in error asks this question:

"Answer me this, can plaintiff in error, under the law, build his own tow boat for towing his own logs and from his own logging camp to his own mill without filing a schedule of rates and charging up against the service in lieu of its actual cost some sum fixed by the state of Washington?"

We answer, yes. There is nothing in the Washington statute which prohibits such an operation. The Stimson Timber Company has been at all times free to do its own towing without supervision or restrictions by the state.

(*h*) At page 52 of the brief of plaintiff in error, the contention is made that a monopoly does not exist

and from natural causes cannot exist in the business of towage of logs on Puget Sound.

It is admitted that such monopoly does not now exist but we believe in preceding pages in this brief we have shown that the possibility of monopoly exists in sufficient degree to warrant state regulation.

(*i*) At page 54 of the brief of plaintiff in error, the contention is made that the statute tends to create a monopoly rather than prevent a monopoly. No provisions of the statute are cited which would lend support to such contention. On the contrary, the statute in common with the public utility laws of practically all of the states of the Union and the interstate commerce act of Congress are designed to afford the public efficient and adequate service at reasonable rates and to assure the public utilities as far as possible protection from unfair practices and an adequate return on their investment in public service. We can see nothing in such a statute which tends to create a monopoly.

Attention is called to the statement in the tariff of the Northwestern Towboat Owners Association to the effect that if the rate cannot be found to fit the particular business the operator is advised to consult the secretary of the towboat association, which counsel says is a new declaration of common carriage. The purpose of this notice has been miscontrued. The Northwestern Towboat Owners Association, acting in cooperation with the department of public works, had attempted to promulgate a tariff which would cover

every conceivable towage operation on Puget Sound. If it had failed in such effort, it asked the towboat operators to call the attention of the secretary to the omission, the evident purpose being to enable the secretary to see that supplements to the tariff were prepared, which would make it in fact a complete schedule of towage rates.

(*j*) At page 55 of the brief of plaintiff in error, the contention is made that the right of private contract for the towage of logs is denied when the rate is prescribed by the state. As we have repeatedly said, the statute under consideration does not prohibit private contracts for towage.

(*k*) At page 59 of the brief of plaintiff in error, the contention is made that all transportation is not common carriage. This is readily admitted and needs no discussion. The law is, however, as we have stated under our third heading, that a common carrier cannot make any contract of private carriage at rates or on terms that differ from its published tariff. For this reason the circus train and Pullman cases have no application to the case at bar where the Shively Towboat Company had a tariff covering all towing service and notwithstanding such tariff attempted to make an agreement with the Stimson Timber Company for towing services at rates less than tariff.

We respectfully urge upon this court, therefore, that it should hold that the towage business on Puget Sound is one affected with a public interest and subject to regulation by the state of Washington; that

the Shively Towboat Company is so operating its towboats that it is engaged in the conveyance of property for the public use for hire and therefore a common carrier under the state statute; and that, having filed a tariff covering all its towage services, it could not make a private contract with the Stimson Timber Company for towage at rates less than tariff.

This court should, therefore, affirm the supreme court of the state of Washington.

Respectfully submitted,

JOHN H. DUNBAR,
Attorney General of the State of Washington.

H. C. BRODIE,
Assistant Attorney General of the State of Washington.

Attorneys for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

No. 66.—October Term, 1927.

State of Washington on the Relation of Stimson Lumber Company, Plaintiff in Error,
vs.
E. V. Kuykendall et al.
} In Error to the Supreme Court of Washington.

[November 21, 1927.]

Mr. Justice Butler delivered the opinion of the Court.

October 17, 1924, the Department of Public Works, after hearing upon a complaint of relator, made an order which declared that a specified tariff rate for towing logs from Clifton to Lake Union in Seattle was "just, fair and no more than sufficient", and directed the Shively Towboat Company to collect from relator charges based on that rate for towing done between March 1, and May 1, 1924. The superior court affirmed the order. Relator appealed to the Supreme Court and there challenged the validity of the order and statutory provisions under which it was made on the ground that they are repugnant to the due process clause of the Fourteenth Amendment. The court held them valid and affirmed the judgment. 137 Wash. 602.

Relator got logs near Clifton and had a mill for the manufacture of lumber at Lake Union. The distance by water is about 100 miles. The Northwestern Towboat Owners Association, in accordance with an order of the Department, filed a tariff effective September 30, 1923. The tariff included maps showing Puget Sound and adjacent waters divided into zones; it named rates for towing between all points thereon; it contained a list of 50 operators, including the Shively Company, that concurred therein; it specified rates to be charged for towing ships, scows and logs between zones, and rates for many other services to be rendered by tugs. The rate specified for towing logs from the zone including Clifton to that including Lake Union was 94 cents per thou-

sand feet. A note declared "all tows at owners risk", and stated that the tariff was intended to name rates for all services on Puget Sound and adjacent waters. Commencing March 1, 1924, the Shively Company towed logs for relator from Clifton to Lake Union; and, in accordance with an agreement between them, charged $16.50 per section. Either could terminate the arrangement at will. A supplement to the tariff, effective May 1, 1924, named $25 per section as the rate from Clifton to Lake Union. That rate was the same or a little less than 94 cents per thousand. Relator's logs were towed by the section, and the last mentioned rate was put in so that it would not have to scale the logs in order to ascertain the charges. June 6, 1924, relator complained to the Department asserting, among other things not here material, that the business of towing logs was not affected with a public interest or within the jurisdiction of the Department. Then followed the hearing, order and judgments above referred to.

The statutes of Washington declare that towboats operated "for the public use in the conveyance of persons or property for hire over and upon the waters within this state" are common carriers. They require that charges made by common carriers "shall be just, fair, reasonable and sufficient;" that the carriers file with the Department of Public Works schedules showing the rates to be charged; that the names of carriers who are parties to joint tariffs shall be specified therein; and that each party other than the one filing the tariff, shall file such evidence of concurrence as may be required. And the statutes make it unlawful for any such carrier to collect different compensation than that provided for in the schedules, and prohibit it from charging any person a greater or less compensation than that collected from others for like contemporaneous service. Other provisions authorize the Department to prescribe and enforce the rates to be charged by all common carriers including towboats. Remington's Compiled Statutes, § 10344, *et seq.*

Relator does not here contest the reasonableness of the rate; it does not question the power of the State or the authority of the Department to prescribe and enforce reasonable rates for transportation by common carriers on Puget Sound and adjacent waters in Washington; it does not contend that, if the Shively Company was a common carrier of logs by towboat, the agreement for trans-

portation of relator's logs for less than the tariff would be valid, or that the order complained of would not be valid. It is established that, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted into a common carrier by mere legislative command. *Frost Trucking Co.* v. *R. R. Commission*, 271 U. S. 583, 592; *Michigan Commission* v. *Duke*, 266 U. S. 570, 577.

It cannot reasonably be said that operators of towboats may not become common carriers in the towing of logs in Puget Sound and adjacent waters. The manufacture of lumber at mills located by these waters is one of the principal industries of the State. The forests are tributary to the Sound and waters connecting with it. Large quantities of logs are floated from the forests to the mills. Towboats are commonly used for that purpose. In all essential particulars that service is like the carriage of freight in vessels. The reasons for rate regulation are the same in one case as in the other. Within settled principles, one who undertakes for hire to transport from place to place the property of others who may choose to employ him is a common carrier. *Propeller Niagara* v. *Cordes et al.*, 21 How. 7, 22. The tariff filed by the Northwestern Towboat Owners Association shows that 50 owners held themselves out as engaged in the business of common carriers, including the towing of logs; and, for that purpose, they devote their towboats to the use of the public. They are common carriers, not because of legislative fiat, but by reason of the character of the business they carry on. The statute does not attempt to make all towboats common carriers. Its application is limited to those operated in the public use for hire. The rule that towboats not having exclusive control of vessels towed are not to be held to the strict liability of common carriers* does not affect the question under consideration. And the notice in the tariff that all tows are at owner's risk is immaterial. "A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests." *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 440. The Shively Company stands the same as the other parties to the tariff. It was engaged in the general towboat business; it towed logs for others as well as for relator; it held itself out as a common carrier in that line of business and by the tariff gave public

*The Steamer Webb, 14 Wall. 406, 414; The Margaret, 94 U. S. 494, 496; Transportation Line *v.* Hope, 95 U. S. 297, 300.

notice to that effect. Its towboat was devoted to the public use, among other things, for the transportation of logs. By its own choice, it became a common carrier. *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252. The State had power to regulate its charges. *Munn* v. *Illinois*, 94 U. S. 113. The purpose of the regulations complained of is to establish reasonable rates to be charged, and to prevent unjust discrimination, by public carriers. Such regulations would be of little value if the state law permitted the shippers by private contract with public carriers to obtain the towing of their logs for less than the prescribed rates. Relator was free to have its logs towed by a private carrier for such compensation as might be agreed and without regard to the rates established by the Department. The order was not aimed at any such transaction. It being conceded here that the charges in question are not excessive, the relator's contention that the state rate regulation deprives it of its property in violation of the Fourteenth Amendment has no foundation.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.